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No. 2481

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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

MARY L. GIBBONS,

Petitioner,

vs.

J. S. GOLDSMITH, as Trustee in Bankruptcy of the  
Estate of PAT GIBBONS, Bankrupt,

Respondent.

In the Matter of PAT GIBBONS, Bankrupt.

**Petition for Revision and Transcript of  
Record in Support Thereof**

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of Law,  
a Certain Order of the United States District  
Court for the Western District of Wash-  
ington, Northern Division.

**Filed**

OCT 7 - 1914

**E. D. Monckton,**





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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer .....	15
Certificate of Clerk U. S. District Court to Transcript of Record in Support of Peti- tion for Revision .....	30
EXHIBITS:	
Exhibit "A"—Petition for Order Requir- ing Parties to Propound Claims, etc...	7
Exhibit "B"—Objection to Jurisdiction and Motion to Quash, etc. ....	14
Exhibit "C"—Answer .....	15
Exhibit "C-2"—Reply of Trustee to An- swer of Mary L. Gibbons.....	20
Exhibit "D"—Order of Referee in Bank- ruptcy, etc. ....	21
Exhibit "E"—Opinion on Review of Order of Referee .....	23
Exhibit "F"—Order Confirming Order of Referee .....	29
Motion to Quash, Objection to Jurisdiction and.	14
Objection to Jurisdiction and Motion to Quash..	14
Opinion .....	23

Index.	Page
Order Confirming Referee's Decision In Re Possession of Community Property, etc. . . . .	29
Order of Referee in Bankruptcy . . . . .	21
Order Requiring Parties to Appear Before Referee in Bankruptcy and to Show Cause, etc..	10
Order Supplementary to Order of June 24, 1914, Requiring Parties to Propound Claims, etc.	13
Petition for Order Requiring Parties to Propound Claims, etc. . . . .	7
Petition for Review . . . . .	1
Reply of Trustee to Answer of Mary L. Gibbons.	20



*The United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. —.

In the Matter of PAT GIBBONS,

Bankrupt.

MARY L. GIBBONS,

Petitioner.

**Petition for Review.**

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Mary L. Gibbons, and respectfully petitions and shows the Court:

FIRST: That your petitioner is now and for more than twenty-nine years last past has been the wife of said Pat Gibbons, bankrupt.

SECOND: That on the 30th day of June, A. D. 1914, in King County, Washington, there was delivered to and served upon your petitioner a petition, order and supplemental order, requiring your petitioner to propound her claim, in proceedings pending in the District Court of the United States for the Western District of Washington, Northern Division, in Bankruptcy, in the matter of Pat Gibbons, Bankrupt No. 4853, a true copy of which petition, order and supplemental order, so delivered to and served upon your petitioner, is hereto attached marked Exhibit "A," and is by reference made a part of this petition.

THIRD: That prior to the service of said petition, order and supplemental order hereinbefore referred to, your petitioner was not a party to said bankruptcy

proceedings, had [1\*] not voluntarily or otherwise appeared therein, and had taken no part therein.

FOURTH: That thereafter, on the 7th day of August, A. D. 1914, your petitioner duly filed with the Referee before whom said proceedings were then pending and served upon the attorneys for the trustee her special appearance and objections to the jurisdiction of the Court and of said Referee, and motion to quash a true copy of which said special appearance and objections to the jurisdiction of the Court and of said Referee is hereto attached, marked Exhibit "B" and is by reference made a part of this petition, and at the same time your petitioner preserving her special appearance and still objecting to the jurisdiction of the Court and of said Referee, duly served upon the attorneys for the trustee and filed with the Referee her answer to said petition, a true copy of which is hereto attached, marked Exhibit "C" and is hereby made a part of this petition.

FIFTH: That thereafter the trustee in said bankruptcy on the 7th day of August, 1914, served upon your petitioner and filed with the Referee, a reply to said answer, a true copy of which said reply is hereto attached marked Exhibit "C-2," and is by reference made a part of this petition.

SIXTH: That thereafter on the 31st day of July A. D. 1914, said Referee made and entered an order in said proceedings overruling your petitioner's objections and denying your petitioner's motion to quash, a true copy of which said order is hereto attached, marked Exhibit "D," and is by reference

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\*Page-number appearing at foot of page of original certified Record.



made a part of this petition.

SEVENTH: That thereafter on the —— day of August, A. D. 1914, your petitioner filed her petition to have said order and decision of said Referee reviewed by the Honorable Judges of the United States District Court of the Western District of [2] Washington, Northern Division, and thereupon the said Referee duly certified said proceeding for review to the Honorable Judges of said Court.

EIGHTH: That thereafter on the 28th day of August, 1914, the Honorable Jeremiah Neterer, one of the Judges of said Court, rendered his opinion in writing sustaining the order theretofore made by said Referee, a true copy of which is hereto attached, marked Exhibit "E," and is made a part of this petition.

NINTH: That thereafter on the 3d day of September, A. D. 1914, an order was signed and entered by the Honorable Judge, Jeremiah Neterer, confirming the said order theretofore made by said Referee on July 31st, 1914, and ordering and directing the trustee in bankruptcy to proceed with the administration of said estate, a copy of which said order is hereto attached, marked Exhibit "F" and is by reference made a part of this petition.

TENTH: That no proof was taken in connection with the determination by said Referee or by the Honorable Jeremiah J. Neterer, and the entire proceedings upon which said orders were grounded appear in the exhibits attached hereto.

ELEVENTH: That all of the property attempted to be administered upon, described in the petition

served upon your petitioner, was acquired in the State of Washington by said Pat Gibbons and your petitioner by the joint labors and efforts of said Pat Gibbons and your petitioner since the date of the marriage of said Pat Gibbons and your petitioner, and is the community property of said Pat Gibbons and your petitioner, and your petitioner has a valid subsisting claim therein.

TWELFTH: Your petitioner charges the fact to be that the said District Court erred in overruling the objections of your petitioner to the jurisdiction of said Court and in denying your petitioner's motion to quash said order requiring your [3] petitioner to propound her claim, and erred in sustaining and confirming the said order of the Referee made on the 31st day of July, A. D. 1914, and erred in ordering and directing said Seattle National Bank to turn over to the trustee the sum of \$8,174.51, and erred in ordering and directing said trustee to proceed with the distribution of said sum of \$8,174.51, and the further sum of \$48,050, received by the Trustee from an attempted sale of the section of coal land situate in King County, Washington, owned by said Pat Gibbons, bankrupt, and your petitioner as their community property; and your petitioner is aggrieved thereby, and therefore not waiving any rights, she prays this Honorable Court to review and revise the decision of the Court below.

THIRTEENTH: Your petitioner further charges that rights of your petitioner in and to said section of coal land attempted to be sold by said trustee for which he claims to have received said sum of \$48,-



050, or the rights of your petitioner in and to said sum of \$48,050, or the rights of your petitioner in and to the said sum of \$8,174.51, now on deposit in the Seattle National Bank of Seattle, Washington, derived from the leasing of said coal land, cannot be adjudicated or determined in this summary proceeding and can only be adjudicated and determined in a plenary suit to be brought for that purpose by the trustee in the Superior Court of the State of Washington, for King County, which is the only court having jurisdiction to hear and determine the rights of your petitioner in and to said funds and said coal lands.

FOURTEENTH: Your petitioner further charges that under the laws of the State of Washington, where all of said property was acquired and is situate, the community property acquired by a husband and wife cannot be taken by execution or otherwise, to [4] satisfy the debts of the husband, and that under the laws of said State of Washington the husband cannot sell, mortgage or dispose of the real property belonging to the community without the wife in the mortgage or conveyance.

FIFTEENTH: Your petitioner further charges she has not consented to the proceedings or any of them; that she has not consented to or joined in the attempted sale of said section of coal land; that she has at all times objected to the jurisdiction of the Court and the attempt to adjudicate and dispose of her interests in said funds and said coal land in this summary proceeding.

Your petitioner therefore prays that a Writ of

Review issue herein and that such order of the District Court be set aside and held for naught; that said order of said Referee be vacated, set aside and held for naught, and that it be adjudged and decreed that the District Court has no jurisdiction over the said \$8,174.51, now in the possession of the Seattle National Bank; no jurisdiction, right or authority over the said sum of \$48,050, claimed to have been realized from the attempted sale of said section of coal lands, and no jurisdiction to sell or dispose of said coal lands, and no jurisdiction to adjudge or determine in this summary proceeding the rights, claims or interest of your petitioner in or to any of said funds or lands, and that your petitioner be given such other and further relief as shall be proper.

WALTER S. FULTON,  
ARTHUR E. GRIFFIN and  
G. C. ISRAEL,  
Attorneys for Petitioner. [5]

State of Washington,  
County of King,—ss.

Mary L. Gibbons, the petitioner in the foregoing petition, does hereby make solemn oath that the statements contained therein are true, according to the best of her knowledge, information and belief.

MARY L. GIBBONS.

Subscribed and sworn to before me this 9th day of September, A. D. 1914.

[Seal]

G. C. ISRAEL,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [6]



**Exhibit "A"—Petition for Order Requiring Parties  
to Propound Claims, etc.**

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

**PETITION FOR ORDER REQUIRING PARTIES  
TO PROPOUND CLAIMS, ETC.**

To the Honorable Judges of the Above-entitled  
Court:

Comes now J. S. Goldsmith, trustee in bankruptcy  
herein, and respectfully reports to the Court as fol-  
lows:

1. That on the —— day of June, 1914, there came  
into the hands of your petitioner \$48,050 cash, being  
the sum realized by your petitioner on the sale of  
real property to the Dexter Horton Trust & Savings  
Bank, as per order of Court heretofore entered  
herein; and said sum ever since has been and now  
is in the possession and under the control of your  
petitioner as trustee.

2. That at the time of the entry of adjudication  
of bankruptcy herein the above-named Pat Gibbons  
was the owner of a certain coal mining property  
located in King County, Washington, and more par-  
ticularly described as Section 16, Township 21 North,  
Range 7 East, W. M., containing six hundred and  
forty acres, more or less, being the property known

as the Occidental Coal Mine, which property came into the possession and control of your petitioner as trustee and remained in his possession and control, subject to the lease hereinafter mentioned, until sold by order of this Court, as shown by the record and files herein.

3. That prior to the filing of the petition for adjudication of bankruptcy herein, the said coal mining [7] property had been leased to F. H. Ketcham, said lease running for twenty-five years, from November 30, 1910, with option in the lessee to renew the said lease for twenty-five years additional, a copy of which lease is annexed to the inventory herein; that by the terms of said lease the said lessee was required to pay certain rentals to be computed and determined by the amount of coal and kindred products taken from said mine, and in any event a minimum rental of \$2,500.00 per annum to be paid in quarterly installments.

4. That your petitioner upon qualifying as trustee was undetermined whether to recognize the validity of said lease, and, in order that your petitioner might not be estopped from questioning the validity of said lease, your petitioner refused to accept any payments of rent tendered by said lessee; that said lessee, the said F. H. Ketcham, his heirs and assigns, thereupon from time to time paid to the Seattle National Bank, of Seattle, Washington, for the account of your petitioner, various sums of money which said lessee, his heirs and assigns, admitted to be due as rent under the terms of the lease hereinbefore referred to, which sums of money, at the time



of the sale and transfer of said coal mining property, as per order of this Court heretofore entered, amounted to at least \$8,174.51; that said sum still remains in the possession and control of said Seattle National Bank.

5. That your petitioner has determined to accept the sum of \$8,174.51, now in the hands of said Seattle National Bank, as aforesaid, but that said bank refuses to pay over said sum to your petitioner, and alleges as ground for so refusing, that one Mary L. Gibbons, the wife of said Pat [8] Gibbons, the bankrupt herein, asserts some right, title, claim or interest in said fund.

6. Your petitioner is advised and believes the fact to be that said Mary L. Gibbons has no right, title, claim or interest in and to the fund of \$48,050 hereinabove mentioned, derived from the sale of said property, now in the possession and control of your petitioner, and that said Mary L. Gibbons has no right, title, claim or interest in and to the funds now in the hands of the said Seattle National Bank as aforesaid; that nevertheless your petitioner believes it advisable that some final determination be made by this Court establishing the rights of said Mary L. Gibbons in said moneys, if any she has.

WHEREFORE, your petitioner prays that an order be entered herein requiring the said Seattle National Bank to appear at a time and place to be specified therein and show cause why it should not be ordered to pay to your petitioner, as trustee in bankruptcy herein, the sum of \$8,174.51, coming into its possession and control as hereinabove mentioned

and described, and further requiring said Mary L. Gibbons to appear at the same time and place and assert and propound to the referee any right, title, claim or interest, which she has or claims to have in the moneys now in the possession and control of your petitioner, as trustee herein, and in the said sum of \$8,174.51, now in the possession and control of said Seattle National Bank; and further providing that if the said Mary L. Gibbons fails to so assert and propound, that she be barred of any and all right, title, claim or interest in and to said moneys now in the hands of your petitioner as trustee, and in and to said fund on deposit in said Seattle National Bank.

J. S. GOLDSMITH,  
Trustee. [9]

United States of America,  
Western District of Washington,—ss.

J. S. Goldsmith, being first duly sworn, on oath says: That he is the trustee named in the foregoing petition; that he has read said petition, knows the contents thereof and believes the same to be true.

J. S. GOLDSMITH.

Subscribed and sworn to before me this 24th day of June, 1914.

[Seal] ELKAN MORGANSTIEN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

**Order [Requiring Parties to Appear Before Referee  
in Bankruptcy and to Show Cause, etc.].**

This cause coming on to be heard on the foregoing petition of the trustee:



IT IS ORDERED that said Seattle National Bank be and it is hereby required to appear before the undersigned referee in bankruptcy, at his office in Room No. 445, Henry Building, in Seattle, in said district, on the 1st day of July, 1914, at the hour of two o'clock P. M., and then and there show cause why it should not be required to forthwith pay over to J. S. Goldsmith, trustee in bankruptcy herein, the sum of \$8,174.51 cash, now in its possession and control, and coming into its hands in the manner described in the foregoing petition.

AND IT IS FURTHER ORDERED that Mary L. Gibbons, the wife of Pat Gibbons, the bankrupt herein, be and she is hereby required to appear before the undersigned referee in bankruptcy, [10] at his office in Room No. 445, in the Henry Building, in Seattle, in said district, on the 1st day of July, 1914, at the hour of two o'clock P. M., and then and there assert and propound to the undersigned referee in bankruptcy any right, title, claim or interest which she has or claims to have in and to the moneys mentioned and described in the foregoing petition and which are now in the possession and control of said trustee, and in and to the fund mentioned and described in the foregoing petition as being in the possession and control of said Seattle National Bank, and that upon failure so to do that the said Mary L. Gibbons be barred of all right, title, claim or interest in and to said moneys now in the hands of said trustee and in and to said fund now in the possession and control of said Seattle National Bank.

AND IT IS FURTHER ORDERED that service of this petition and order be made by delivery of a certified copy thereof to said Seattle National Bank, and to said Mary L. Gibbons, by any person who is a citizen of the State of Washington above the age of twenty-one years and not interested in this proceeding, or by the United States Marshal for the Western District of Washington, Northern Division.

Entered in open court this 24th day of June, 1914,  
at Seattle, Washington.

JEREMIAH NETERER,  
Judge.

I hereby certify that the above and foregoing petition and order is a true copy of the original petition and order on file in my office.

[Seal of the United States District Court, Western  
District of Washington.]

FRANK L. CROSBY,  
Clerk.

By B. E. Simpkins,  
Deputy.

[Endorsed]: Petition for order requiring parties to propound claims, etc., and order to show cause thereon. Filed in the U. S. Dist. Court, Western Dist. of Wash. June 24, 1914. Frank L. Crosby, Clerk. B. E. S., Deputy. [11]



*In the District Court of the United States, Western  
District of Washington, Northern Division.*

No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

**Order Supplementary to Order of June 24, 1914,  
Requiring Parties to Propound Claims, etc.**

An order having been entered in the above-entitled proceeding on the 24th June, 1914, signed by the undersigned District Judge, directing the appearance of the Seattle National Bank and Mary L. Gibbons on the first July, 1914, to answer the petition of J. S. Goldsmith, trustee in bankruptcy herein, and, whereas said order inadvertently read said parties should appear "before the undersigned referee in bankruptcy at his office in Room No. 445, in the Henry Building, in Seattle, in said district, etc.,"

NOW, THEREFORE, SAID ORDER IS HEREBY SUPPLEMENTED AND AMENDED so as to require the appearance and return of said parties, and each and both of them, before the Honorable John P. Hoyt, Referee in Bankruptcy, at his office in Room No. 445, in the Henry Building, in Seattle, in said District, on the first day of July, 1914, at the hour of two o'clock P. M., and,

IT IS HEREBY FURTHER ORDERED AND DIRECTED that service of this supplementary order be made by delivery of a certified copy hereof to the said Seattle National Bank and to the said Mary L. Gibbons by the United States Marshal for

the Western District of Washington, Northern Division.

Entered in open court this 27th day of June, 1914,  
at Seattle, Wash.

JEREMIAH NETERER,

District Judge.

I hereby certify that the foregoing is a true, correct and complete copy of order supplementary to order of June 24, 1914, requiring parties to propound claims, etc., in the above-entitled matter, as same appears on file in my office.

Dated this 27th day of June, 1914.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,

Clerk U. S. District Court.

By B. E. Simpkins,

Deputy. [12]

[Endorsed]: Order Supplementary to Order of June 24, 1914, Requiring Parties to Propound Claims, etc. Filed in the United States District Court, Western District of Washington. Jun. 27, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [13]

**Exhibit "B"—Objection to Jurisdiction and Motion to Quash, etc.**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.



OBJECTION TO JURISDICTION AND  
MOTION TO QUASH.

Comes now Mary L. Gibbons, respondent herein, and specially appearing for the purpose of this objection, and motion, and for no other purpose, objects to the jurisdiction of the Court to hear and determine this matter, and move that the citation heretofore issued and served upon the respondent be quashed, set aside and held for naught because of the lack of jurisdiction on the part of the Court to hear and determine this matter in so far as the property interests and rights of this respondent are concerned.

This objection and motion is based upon the files and records herein.

WALTER S. FULTON and  
ARTHUR E. GRIFFIN,

Attorneys for Respondent Mary L. Gibbons Appearing Specially.

[Endorsed]: Filed in the U. S. Dist. Court, Western Dist. of Wash. Aug. 7, 1914. Frank L. Crosby, Clerk. [14]

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**Exhibit "C"—Answer.**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

**ANSWER.**

Comes now Mary L. Gibbons, respondent herein,

and not waiving the special appearance heretofore entered by her herein, still insisting upon said appearance and the objection and motion interposed in connection therewith, and now refusing to consent to this matter being heard and determined by the Court herein, and objecting to its hearing and determination by this Court, for answer to the petition filed herein and upon which a citation was issued directed to this respondent, says:

I.

Answering paragraph one of the petition, respondent denies any knowledge or information sufficient to form a belief as to the allegations therein contained.

II.

Answering paragraph two of the petition, respondent denies each and every allegation therein contained.

III.

Answering paragraph three of the petition, respondent admits that the lease therein referred to was executed and delivered as therein stated. [15]

IV.

Answering paragraph four of said petition, respondent denies any knowledge or information sufficient to form a belief as to the allegations therein contained, except that respondent admits that the sum of \$8,174.51 is in the possession and control of the Seattle National Bank, and admits that said sum was paid in to the Seattle National Bank from time to time by the said F. H. Ketcham, his heirs and assigns.



## V.

Answering paragraph five of said petition, respondent admits the allegations therein contained.

## VI.

Answering paragraph six of said petition, respondent denies each and every allegation therein contained.

And by way of a further defense and answer to said petition, respondent alleges:

## I.

That this respondent and Pat Gibbons, bankrupt, intermarried approximately thirty years ago, and ever since said time have been and now are husband and wife.

## II.

That any and all property acquired by either the respondent or her said husband, Pat Gibbons, during said marital relation was acquired through their joint efforts, and was and is the community property of respondent and her said husband, and including Section Sixteen (16) Township, Twenty-one (21) [16] North, Range Seven (7) East, Willamette Meridian, containing 640 acres, being the property known as the Occidental Coal Mine, and described in the petition herein.

## III.

That all of the money referred to in the fifth paragraph of the petition filed herein, viz.: the sum of \$8,174.51, now held by and in the possession of the Seattle National Bank of Seattle, Washington, is money derived from the rental of said coal land hereinbefore described, known as the Occidental Coal

Mine, and was the community property of this respondent and of Pat Gibbons, her husband.

#### IV.

That long before any attempted sale of said Section 16, Township 21 North, Range 7 East, W. M., was made, or attempted, this respondent duly and regularly filed in the office of the County Auditor of King County, Washington, a claim in all respects made and verified as required by law, asserting and claiming her community title and interest in and to said property, and that the trustee in bankruptcy has at all times since, long before the attempted sale, had full notice of the rights and claim of this respondent, and that said property was and is the community property of this respondent, and her said husband, Pat Gibbons.

#### V.

That substantially the entire indebtedness alleged to be owing by the bankrupt Pat Gibbons, and substantially [17] all of the claims filed against said bankrupt Pat Gibbons are the separate indebtedness of said Pat Gibbons, and not an indebtedness against the community consisting of Pat Gibbons and this respondent, Mary L. Gibbons, his wife; that the claim filed and asserted herein against said Pat Gibbons of the Dexter Horton Trust & Savings Bank is the separate indebtedness of said Pat Gibbons, and was incurred by him while living in the District of Alaska, separate and apart from this respondent, Mary L. Gibbons, excepting of \$30,000.00 of said claim of said Dexter Horton Trust & Savings Bank, which said amount is the indebtedness of N. H. Latimer and



C. E. Burnside, and is not, and never has been, the indebtedness of said Pat Gibbons, or the indebtedness of the community.

WHEREFORE, the respondent prays that these proceedings be quashed, and that she go hence and be allowed her costs and disbursements.

WALTER S. FULTON and  
ARTHUR E. GRIFFIN,

Attorneys for Said Respondent Mary L. Gibbons.  
[18]

State of Washington,  
County of King,—ss.

Mary L. Gibbons, being first duly sworn, on oath says: That she is the respondent in the above-entitled action; that she has read the foregoing answer, knows the contents thereof, and that the same is true.

MARY L. GIBBONS.

Subscribed and sworn to before me this 8th day of July, A. D. 1914.

ARTHUR E. GRIFFIN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Answer. Filed July 10, 1914, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western Dist. of Washington. Aug. 7, 1914. Frank L. Crosby, Clerk. [19]

**Exhibit "C-2"—Reply of Trustee to Answer of  
Mary L. Gibbons.**

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

**REPLY OF TRUSTEE TO ANSWER OF MARY  
L. GIBBONS.**

Comes now J. S. Goldsmith, trustee herein, and replying to the further defense and answer of Mary L. Gibbons as set forth and alleged in her answer to the petition of the trustee herein says:

**I.**

Answering paragraph V of said answer, the trustee denies each and every allegation therein contained, and on information and belief alleges that all of the claims proved and allowed in this bankruptcy proceedings were and are the community indebtedness of the said Pat Gibbons and Mary L. Gibbons, his wife.

**McCLURE & McCLURE,**

Attorneys for Trustee.

State of Washington,  
County of King,—ss.

J. S. Goldsmith, being first duly sworn, on oath says: That he is the trustee named in the foregoing



reply; that he has read said reply, knows the contents thereof and believes the same to be true.

[Seal]

J. S. GOLDSMITH.

Subscribed and sworn to before me this 13 day of July, 1914.

ELKAN MORGENSTERN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed in the U. S. Dist. Court. Aug.  
7, 1914. Frank L. Crosby, Clerk. [20]

**Exhibit "D" [Order of Referee in Bankruptcy, etc.].**

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

This cause heretofore came duly and regularly on for hearing on the petition of J. S. Goldsmith, as trustee in bankruptcy of the above-named bankrupt, that Mary L. Gibbons, wife of the bankrupt, propound her claims to the moneys in the possession of the trustee and to the additional moneys in the possession of the Seattle National Bank, and that said Seattle National Bank pay to the trustee the moneys in its possession, and the answer of said Mary L. Gibbons to said petition, and the trustee's reply to said answer, the trustee and the said Mary L. Gibbons appearing by their respective attorneys,

and it appearing from the facts disclosed by the pleadings that the funds to which this controversy relates are all the proceeds of property belonging to the community composed of the bankrupt and his wife, Mary L. Gibbons, and that some, if not all, of the claims proved and allowed herein are the community debts of the bankrupt and his said wife, and that the question at this time presented for the decision of the undersigned Referee is whether the bankruptcy proceedings against the above-named bankrupt brings in to the possession of the Court the estate of the community composed of the bankrupt and his wife, and whether accordingly said trustee is entitled to the possession of the moneys above mentioned; and said matter having been duly argued and submitted, and the [21] undersigned Referee having heretofore filed herein his memorandum decision in writing;

IT IS ORDERED:

1. That the trustee is entitled to the sole possession and control of all community property of the above named bankrupt and his wife, Mary L. Gibbons, or the funds derived therefrom, including the moneys now in the possession of the trustee arising from the sale of that certain coal mining property located in King County, Washington, and more particularly described as Section 16, Township 21 North, Range 7 East, W. M., containing six hundred and forty acres, more or less, being the property known as the Occidental Coal Mine, and to the additional moneys in the possession of the Seattle National Bank received by said bank from F. H.



Ketcham on account of that certain lease mentioned in the trustee's petition herein, and all of said funds are subject to administration and distribution herein in such manner as this Court may hereafter direct.

2. That the matter of the administration and distribution of said funds be, and the same is, hereby set for hearing before Cicero R. Hawkins, Referee, at his office at Seattle, in said district, at the hour of two o'clock P. M., August 13, 1914, at which time and place the said Mary L. Gibbons shall appear and propound her claim, if any she has, in and to the said moneys in the possession of the trustee and in the possession of the said Seattle National Bank.

Dated at Seattle, in said district, this 31st day of July, 1914.

JOHN P. HOYT,  
Referee.

[Endorsed]: Filed in the United States Dist. Court, Western Dist. of Washington, Aug. 7, 1914. Frank L. Crosby, Clerk. [22]

**Exhibit "E" [Opinion on Review of Order of Referee].**

*United States District Court, Western District of  
Washington, Northern Division.*

No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

Filed August 28, 1914.

ON PETITION TO REVIEW ORDER OF  
REFEREE — ORDER OF REFEREE  
CONFIRMED.

Pat Gibbons, a married man, was adjudged a bankrupt. Among the assets scheduled is 640 acres of coal land, known as Occidental Coal Mine. This land had been leased for a long term of years on a royalty basis, with a minimum rental of \$2,500 per annum, payable quarterly. This property came into the possession of the trustee, subject to the lease. The lessee paid, from time to time, to the Seattle National Bank, for the trustee, rent, under the terms of the lease, \$8,174.51. In due course said land was sold by the trustee for the sum of \$48,050, cash paid to the trustee. On June 24, 1914, a petition was filed by the trustee praying that the Seattle National Bank show cause why it should not be required to pay to the trustee said \$8,174.51; also that Mary L. Gibbons, wife of the bankrupt, be required to appear and assert and propound any claim, interest or right she may have to any of the money. At the time appointed under the rule, Mary L. Gibbons appeared specially and objected to the jurisdiction of the Court, and moved that the rule be set aside in so far as her property interest or rights were concerned. The Referee before whom the matter was returnable denied the exception and overruled the motion, and thereupon she filed her answer, still reserving her right under the exception and motion, in which she alleges, in substance, that the land is community property under the laws of Washington; that the



money in issue was derived from the lease and sale of the land and was community property; that long before the sale of the land she filed in [23] the County Auditor's office of King County in which the land is situated, her declaration and claim of community interest in the land as provided by the laws of Washington. That the trustee in bankruptcy, long before the sale of the land, had notice of her claim and rights. That *substantially all of the claims filed against the estate of the bankrupt* are his separate indebtedness and not indebtedness of the community. That it was created by the bankrupt while living in Alaska, separate and apart from the wife, except \$30,000, which is indebtedness of others than the bankrupt or the community referred to.

The Referee held that the trustee was entitled to the possession of the community property, and that, in the distribution of the fund, only community claims can be paid out of the community property, and this Court should determine the right and status of these several claims and pay them where the right appears. A petition to review this order of the Referee is now before the Court.

WALTER S. FULTON,

ARTHUR E. GRIFFIN,

For Petitioner.

McCLURE & McCLURE,

For Trustee.

CLISE & POE,

For Dexter Horton Trust & Savings Bank.

NETERER, District Judge (after stating the facts as above):

It being admitted by the answer of Mary L. Gibbons that a portion of the indebtedness filed against the bankrupt's estate is community indebtedness, the issue to be determined is whether the community property, under the laws of Washington, passed to the trustee in bankruptcy for the purpose of paying the community indebtedness. The rights of the husband and wife with relation to property are created by the laws of Washington, and the court is governed by the laws of Washington and the interpretation placed thereon by the Supreme Court of that State. [24] The laws of Washington provide that all property acquired after marriage, except such as may be acquired by gift, devise or descent, is community property. Section 5918, Rem. & Bal. Code of Washington, provides:

“The husband has the management and control of the community real property—All such community real property shall be subject—to liens of judgments recovered for community debts and to sale on execution issued thereon.”

Section 70 of the Bankruptcy Act provides that the Trustee, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt which prior to the filing of the petition could have been “sold under judicial process against him”—Act of Congress, June 25, 1910, 36 Stat. at Large, 838, Collier on Bankruptcy, 1914, page 987.

Section 47 of the same act, provides that the trustee shall be vested “with all the rights, remedies and



powers of the creditor holding a lien by legal or equitable proceeding thereon—and powers of a judgment creditor holding an execution duly returned unsatisfied.” Act of Congress, *supra*, Collier on Bankruptcy, 1914, page 650.

The Supreme Court of Washington has uniformly held that an execution issued on a judgment obtained against the husband for a community debt may be levied upon community real property. *Curry vs. Catlin*, 9 Wash. 495; *Horton vs. Donaghue-Kelly Banking Co.*, 15 Wash. 399; *Allen vs. Chambers*, 18 Wash. 341. In *Thygesen vs. Neufelder*, 9 Wash. 455, the Washington Supreme Court held that an assignment by a husband of all of his property for the benefit of his creditors, under the laws of Washington, operated as a transfer of community real and personal property to the assignee in trust for the payment of the community debts. [25]

When the purpose of the Bankruptcy Act is considered as the vehicle by which all of the insolvent's property may be applied to the payment of the indebtedness and the relation of the provisions of Sections 47 and 70, *supra*, of the Act with the provisions of Section 5918, Rem. & Bal. Code, *supra*, and the holdings of the Supreme Court of Washington, *supra*, together with the admission in the answer that some of the indebtedness is community indebtedness, the conclusion is inevitable that the trustee is rightfully in possession of the community property, and the property being in the custody of the Court, it is the duty of the Court to determine the rank and right of the several claims to the fund, including the com-

munity claim, and to distribute it in accordance with the right as it may be found. The contention of the wife, therefore, that she has an adverse interest which the Court cannot dispose of in this summary way and without according to her the right of a plenary action, is not well founded. *Porter vs. Lazear*, 109 U. S. 84, cited by counsel for the wife, I think, is readily distinguished, in this, that by the provisions of the Act which creates the community estate, it is provided that the community real property shall be subjected to the payment of community debts and to sale on execution issued upon judgments obtained. The community right of the wife being a creature of the statute, is by the same statute, subjected to the community obligations; and while the Supreme Court of Pennsylvania held that the dower right of the wife could be sold under execution, there is no provision of the statute of Pennsylvania subjecting the dower interest of the wife to any indebtedness; nor is there a provision in the Bankruptcy laws of 1867, 14 Stat. at Large, page 517, under which that decision was rendered, vesting the trustee with the rights, remedies and powers of a judgment creditor holding an unsatisfied execution, and rights as contained in the provision of the act of June, 1910, *supra*.

The order of the Referee is confirmed.

JEREMIAH NETERER,

Judge. [26]

[Endorsed]: Filed in the United States District Court, Western District of Washington. Aug. 28, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [27]



**Exhibit "F" [Order Confirming Order of Referee].**

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

**ORDER CONFIRMING REFEREE'S DECI-  
SION IN RE POSSESSION OF COMMU-  
NITY PROPERTY, ETC.**

This cause heretofore came duly and regularly on for hearing on review of the decision and order of John P. Hoyt, Referee, dated July 31, 1914, in the matter of the issues made upon the petition of J. S. Goldsmith, as trustee in bankruptcy of the above-named bankrupt, that Mary L. Gibbons, wife of the bankrupt, propound her claim to the moneys in the possession of the trustee (the said moneys being the proceeds of the sale by the trustee of that certain real property described as Section 16, Township 21 North, Range 7 East, W. M., containing six hundred and forty acres, more or less, being the property known as the Occidental Coal Mine, situated in King County, Washington, and duly conveyed by the trustee to the Dexter Horton Trust & Savings Bank), and to the additional moneys in the possession of the Seattle National Bank, and that said Seattle National Bank pay to the trustee the moneys in its possession, the trustee and the said Mary L. Gibbons, and the said Dexter Horton Trust & Savings Bank,

appearing by their respective attorneys, and said matter having been duly argued and submitted to the Court, and the Court having heretofore made and caused to be filed herein his decision that the order of the Referee should be confirmed;

**IT IS ORDERED: [28]**

That the said order of the Referee of July 31, 1914, be, and the same is, hereby confirmed and approved in all respects, and that the administration of said cause proceed as in said order directed.

Dated at Seattle, in said district, this 3d day of September, 1914.

**JEREMIAH NETERER,**

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Sep. 3, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy.  
[29]

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**[Certificate of Clerk U. S. District Court to Transcript of Record in Support of Petition for Revision.]**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copies with the originals thereof in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same are true and perfect transcripts of said originals and of the whole thereof, with the exception of Marshal's re-

turns and acceptances of service.

Witness my hand and the seal of said Court, this  
9th day of September, 1914.

• [Seal]

FRANK L. CROSBY,

Clerk.

By B. E. Simpkins,

Deputy. [30]

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[Endorsed]: No. 2481. United States Circuit Court of Appeals for the Ninth Circuit. Mary L. Gibbons, Petitioner, vs. J. S. Goldsmith, as Trustee in Bankruptcy of the Estate of Pat Gibbons, Bankrupt, Respondent. In the Matter of Pat Gibbons, Bankrupt. Petition for Revision and Transcript of Record in Support Thereof Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Received and filed September 14, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

MARY L. GIBBONS,

Petitioner,

vs.

J. S. GOLDSMITH, as Trustee in Bankruptcy of the  
Estate of PAT GIBBONS, Bankrupt,  
Respondent.

In the Matter of PAT GIBBONS, Bankrupt.

**SUPPLEMENTAL TRANSCRIPT OF RECORD ON  
PETITION FOR REVISION AND TRANSCRIPT  
OF RECORD IN SUPPORT THEREOF**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, a Certain Order  
of the United States District Court for the  
Western District of Washington,  
Northern Division.

Filed

MAR 19 1915

F. D. Monckton,  
Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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MARY L. GIBBONS,

Petitioner,

vs.

J. S. GOLDSMITH, as Trustee in Bankruptcy of the  
Estate of PAT GIBBONS, Bankrupt,  
Respondent.

In the Matter of PAT GIBBONS, Bankrupt.

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**SUPPLEMENTAL TRANSCRIPT OF RECORD ON  
PETITION FOR REVISION AND TRANSCRIPT  
OF RECORD IN SUPPORT THEREOF**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, a Certain Order  
of the United States District Court for the  
Western District of Washington,  
Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Schedule of Assets and Liabilities.....	9
Certificate of Clerk U. S. District Court to Trans- cript of Record.....	20
Choses in Action.....	15
Creditors' Petition.....	1
Oath to Schedule "A".....	12
Oath to Schedule "B".....	18
Order Referring Matter to Referee in Bank- ruptcy, etc. ....	6
Personal Property .....	13
Petition, Creditors' .....	1
Report of Appraisers .....	7
Schedule "A" (1) .....	10
Schedule "A" (2) .....	10
Schedule "A" (3) .....	11
Schedule "A" (4) .....	12
Schedule "A" (5) .....	12
Schedule "B" (1) .....	13
Schedule "B" (2) .....	13
Schedule "B" (3) .....	15
Schedule "B" (4) .....	16
Schedule "B" (5) .....	16
Schedule "B" (6) .....	17



Index.	Page
Schedule of Assets and Liabilities, Amended...	9
Statement of all Debts of Bankrupt.....	10
Statement of All Property of Bankrupt Real Estate .....	13
Summary of Debts and Assets.....	18

[Creditor's Petition.]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4853.

In the Matter of PAT GIBBONS, Alleged Bank-  
rupt.

To the Honorable C. H. HANFORD, Judge of the  
District Court of the United States for the  
Western District of Washington, Northern  
Division:

The petition of Schwabacher Bros. & Co., Inc., a corporation of Seattle, Washington, and Schwabacher Hardware Co., a corporation of Seattle, Washington, and M. & K. Gottstein, a copartnership composed of K. Gottstein and J. L. Gottstein, Arthur Bastheim and Fred V. Fisher, of Seattle, Washington, respectfully shows:

That Pat Gibbons of the City of Renton, in said District, has for the greater portion of the six months next preceding the date of filing this petition resided at the city of Renton, in King County, in said District and is by occupation a merchant.

That the said Pat Gibbons owes debts to the amount of one thousand dollars and over, is insolvent and is neither a wage-earner, nor a person engaged principally in farming or the tillage of the soil.

That your petitioners are creditors of said Pat Gibbons, having provable claims against him, which amount in the aggregate in excess of the value of securities held by them to five hundred dollars; and that neither of your petitioners is entitled to priority

of payment on his said claim within the meaning of Section 64-B of the Bankruptcy Law of 1898, nor has either of your petitioners received a preference within the meaning of Section 60-A-B of said law as amended. [1\*]

## 2.

That neither of your petitioners holds any security, and that the nature and amount of your petitioners claims are as follows:

Due to Schwabacher Bros. & Co., Inc., upon balance for goods, wares and merchandise sold and delivered to said Pat Gibbons, the sum of \$3650.52.

Due to Schwabacher Hardware Co. upon balance for goods, wares and merchandise sold and delivered to said Pat Gibbons, the sum of \$3688.87.

Due to M. & K. Gottstein upon balance for goods, wares and merchandise sold and delivered to said Pat Gibbons, the sum of \$1275.28.

That within four months next preceding the filing of this petition, the said Pat Gibbons, while insolvent, committed an act of bankruptcy, in that he did suffer and permit a creditor to obtain a preference through legal proceedings, and did not at least five days before the sale or final disposition of the property affected by such preference, vacate or discharge such preference. That the facts relating to said act of bankruptcy are as follows:

That on the 26th day of October, 1911, the Washington Trust & Savings Company obtained a judgment against said Pat Gibbons in the Superior Court of the State of Washington in and for the county of King, cause No. 80,398, for the sum of \$79,806.77.

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\*Page-number appearing at foot of page of original certified Record.



That thereafter execution was issued upon said judgment and placed in the hands of the sheriff of King County, State of Washington, and said sheriff on November 1st, 1911, duly levied the same upon the following described property located in King County, State of Washington:

All of Section 16, Township Twenty-one (21) N., Range 7 E., W. M., except one hundred (100) feet right-of-way to C. M. & P. S. Railway [2] Company over the East one-half ( $\frac{1}{2}$ ) of Southeast quarter ( $\frac{1}{4}$ ) of said section.

That the sale of said real property is set for January 13th, 1912, at the hour of 10 o'clock A. M., and that said Pat Gibbons has not to this date vacated or discharged the preference created by the rendition of said judgment and the levy of execution; that said levy has not been lifted.

WHEREFORE, your petitioners pray that service of this petition with subpoena may be made upon the said Pat Gibbons as provided by said bankruptcy law of 1898 as amended, and that he may be adjudged bankrupt within the purview of said law.

SCHWABACHER BROS. & CO., INC.,

By S. ARONSON,

Secretary and Treasurer.

SCHWABACHER HARDWARE CO.

By S. FRIEDENTHAL,

Secretary and Treasurer.

M. & K. GOTTSTEIN.

By J. L. GOTTSTEIN,

Petitioners.

LEOPOLD M. STERN,

Attorney for Petitioners.

State of Washington,  
County of King,—ss.

S. Aronson, being first duly sworn, on oath deposes and says:

That he is the secretary and treasurer of Schwabacher Bros. & Co., Inc., a corporation, and one of the petitioning creditors mentioned and described in the foregoing petition, and he makes this verification for and on behalf of said corporation, and he does hereby make solemn oath that the statement of facts contained in the foregoing petition, are true according to the best of his knowledge, information and belief.

S. ARONSON.

Subscribed and sworn to before me this 10th day of January, 1912.

[Seal] LEOPOLD M. STERN,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [3]

State of Washington,  
County of King,—ss.

S. Friedenthal, being first duly sworn, on oath deposes and says:

That he is the secretary and treasurer of Schwabacher Hardware Co., a corporation, one of the petitioning creditors mentioned and described in the foregoing petition, and he makes this verification for and in behalf of said corporation, and he does hereby make solemn oath that the statement of facts contained in the foregoing petition are true accord-

ing to the best of his knowledge, information and belief.

S. FRIEDENTHAL.

Subscribed and sworn to before me this 10th day of January, 1912.

[Seal]

LEOPOLD M. STERN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

State of Washington,

County of King,—ss.

J. L. Gottstein, being first duly sworn, on oath deposes and says:

That he is a member of the copartnership firm of M. & K. Gottstein, one of the petitioning creditors mentioned and described in the foregoing petition, and he makes this verification for and on behalf of said copartnership, and he does hereby make solemn oath that the statement of facts contained in the foregoing petition, are true according to the best of his knowledge and belief.

J. L. GOTTSTEIN.

Subscribed and sworn to before me this 10th day of January, 1912.

[Seal]

LEOPOLD M. STERN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Indorsed]: Creditor's Petition. Filed in the United States District Court, Western District of Washington. January 10, 1912. A. W. Engle, Clerk. By B. O. Wright. [4]



**[Order Referring Matter to Referee in Bankruptcy,  
etc.]**

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

Whereas, Pat Gibbons, of Seattle, in the County of King and District aforesaid, on the 13th day of July, A. D. 1912, was duly adjudged a bankrupt upon a petition filed in this court against him on the 10th day of January, A. D. 1912, according to the provisions of the acts of Congress relating to bankruptcy,—

IT IS THEREUPON ORDERED, that said matter be referred to John P. Hoyt, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said Pat Gibbons shall attend before said referee on the 18th day of July, at 2:00 P. M. at Seattle, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said involuntary bankruptcy.

Witness, the Hon. EDWARD E. CUSHMAN,  
Judge of the said Court, and the seal thereof, at Seat-

tle, in said District, on the 13th day of July,  
A. D. 1912.

[Seal of the Court]

A. W. ENGLE,  
Clerk.  
B. O. Wright,  
Deputy.

Enter.—EDWARD E. CUSHMAN,  
District Judge.

[Indorsed]: Order of Reference. Filed in the  
United States District Court, Western District of  
Washington. July 13, 1912. A. W. Engle, Clerk.  
By W. [5]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,  
Bankrupt.

**Report of Appraisers.**

We, the undersigned, having been notified that we  
were appointed to estimate and appraise the real and  
personal property aforesaid, have attended to the  
duties assigned us, and after a strict examination and  
careful inquiry, we do estimate and appraise the  
same as follows:

Appraised  
value.

Section sixteen (16), township twenty-one (21) north, range seven (7) east, W. M., King County, Washington, including coal, surface and timber, regardless of any leases, mortgages or liens upon the property .....\$145,000.00

Section sixteen (16), township twenty-one (21) north, range seven (7) east, W. M., King County, Washington, including coal, surface and timber; subject to that certain lease dated November 30, A. D. 1910, by and between the above-named bankrupt Patrick Gibbons and Mary L. Gibbons, his wife, as lessors, and F. H. Ketcham as lessee ..... 100,000.00

One and one-half miles of standard gauge railway on said section 16, \$4000 per mile ..... 6,000.00

Lots nineteen (19) and twenty (20), block thirteen (13), town of Renton, King County, Washington..... 3,500.00

In Witness Whereof we hereunto set our hands at Seattle, Washington, this 10th day of January, 1913.

T. A. HILL,  
CHAS. E. JONES,  
GEO. WALKER EVANS,

[Indorsed]: Report of Appraisers. Filed January 13th, 1913, 10 A. M. John P. Hoyt, Referee.



Filed in the United States District Court, Western Dist. of Washington. Feb. 9, 1915. Frank L. Crosby, Clerk. By B. E. Simpkins, Deputy. [6]

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**[Amended Schedule of Assets and Liabilities.]**

*In the United States District Court for the Western District of Washington, Northern Division.*

IN BANKRUPTCY—No. 4853.

In the Matter of PAT GIBBONS,

Bankrupt.

Comes now Pat Gibbons, the above-named bankrupt, and files herewith his amended schedule of assets and liabilities, in accordance with permission heretofore granted by the Referee in Bankruptcy, and respectfully shows:

I.

That the schedule hereto annexed, marked "A" and verified by his oath, contains a full statement of all of his debts and the names and addresses of his creditors, so far as your bankrupt is able to state.

II.

That the schedule hereto annexed, marked "B" and verified by his oath, contains an accurate inventory of all of his property, both real and personal.

PAT GIBBONS,

Bankrupt.

CASSIUS E. GATES,

Attorney for Bankrupt. [7]

**Statement of All Debts of Bankrupt.****Schedule "A" (1).**

Statement of all creditors who are to be paid in full,  
or to whom priority is secured by law.

Claims which have priority. Amount.

- (1) Taxes and debts due and owing to  
the United States ..... Nothing
- (2) Taxes due and owing to the State of  
Washington, or to any district, or  
municipality thereof ..... Nothing
- (3) Wages due workmen, clerks or  
servants, to an amount not exceed-  
ing \$300 each, earned within three  
months before filing the petition .. Nothing
- (4) Other debts having priority by law

PAT GIBBONS,

Bankrupt.

**Schedule "A" (2).**

Creditors holding securities.....None

PAT GIBBONS,

Bankrupt. [8]

**SCHEDULE "A" (3).**

Creditors whose claims are unsecured.

Names of Creditors.	Address.	When Contracted.	Nature and consideration of the debt.	Amount
exter Horton	Seattle Wash.	1910 and prior thereto	Judgment based upon 2 notes for money loaned	\$78000.00
Smith & Blockson	Seattle Wash.	1910 and prior thereto	Fruit	99.25
Longlove Grocery Co.	Tacoma Wash.	1910 and prior thereto	Groceries	512.99
Alaska Junk Co.	Seattle Wash.	1910 and prior thereto	Old canvas	38.51
Augustine & Kyer	Seattle Wash.	1910 and prior thereto	Groceries	206.04
White River Lumber Co.	Enumclaw Wash.	1910 and prior thereto	Lumber	340.84
Seattle Market	Seattle Wash.	1910 and prior thereto	Beef	833.93
Railway & Steel Supply	Seattle Wash.	1910 and prior thereto	Rails	223.81
M. E. Atkinson	Seattle Wash.	1910 and prior thereto	Insurance	65.81
E. E. Lippman	Seattle Wash.	1910 and prior thereto	Insurance	125.24
Seattle Brewing & Malt- ing Co.	Seattle Wash.	1910 and prior thereto	Beer	2169.98
Standard Oil Co.	Tacoma Wash.	1910 and prior thereto	Oil	301.75
Schwabacher Hardware Co.	Seattle Wash.	1910 and prior thereto	Hardware	3497.92
at McCoy	Seattle Wash.	1910 and prior thereto	Judgment on note, money loaned	5000.00
J. Smith	Enumclaw Wash.	1910 and prior thereto	Note	1000.00



Names of Creditors.		Address.	When Contracted.	Nature and consideration of the debt.	
					Amount.
Schwabacher Co.	Grocery	Seattle	1910 and prior	Groceries	3650.00
		Wash.	thereto		
Galbraith-Bacon		Seattle	1910 and prior	Hay & Grain	173.65
		Wash.	thereto		
Fleshner & Mayer		Seattle	1910 and prior	Clothing	173.00
		Wash.	thereto		
Fairbanks-Morse		Seattle	1910 and prior	Pump and pipe	1200.00
		Wash.	thereto		
Puget Sound Machinery		Seattle	1910 and prior	Machines	19.00
		Wash.	thereto		
Enumclaw Creamery		Enumclaw	1910 and prior	Butter	201.47
		Wash.	thereto		
					<hr/>
					\$97833.39

PAT GIBBONS,  
Bankrupt.

[10]

Schedule "A" (4).

Liabilities on notes or bills which ought to be paid by the drawers, makers, acceptors or indorsers.....Nothing

PAT GIBBONS,  
Bankrupt.

Schedule "A" (5).

Accommodation paper.....Nothing

PAT GIBBONS,  
Bankrupt.

Oath to Schedule "A."

United States of America,  
District of Washington,—ss.

On this 9th day of June, 1914, before me, personally came Pat Gibbons, the person mentioned in and who subscribed to the foregoing amended schedules, and who, being by me first duly sworn, did

declare that the said schedules, as amended, contained a true and correct statement of all his debts, in accordance with the Acts of Congress relating to bankruptcy.

PAT GIBBONS.

Subscribed and sworn to before me this 9th day of June, 1914.

[Seal]

LEROY V. NEWCOMB,

Notary Public in and for the District and State of Washington, Residing at Seattle, in Said State.

[11]

**Schedule "B" (1).**

**Statement of All Property of Bankrupt Real Estate.**

Description.

Value.

**Occidental Coal Mine:**

Section 16, township 21 north of range

7 E., W. M., containing 640 acres . . . 1,000,000.00

Together with one and one-half ( $1\frac{1}{2}$ )

miles of standard gauge railway . . . 15,000.00

Lots 19 and 20 of the Town of Renton

with dwelling-house thereon . . . . . 2,500.00

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\$1,017,000.00

PAT GIBBONS,

Bankrupt.

**Schedule "B" (2).**

**Personal Property.**

A—Cash in hands of Farrell, Kane & Stratton, attorneys, which was received from the City of Tacoma, and had

been fixed and determined through arbitration proceedings had before the filing of the original petition herein, and which was subsequently paid over to said attorneys.....\$1,690.74

B—Bills of exchange, promissory notes or Securities of any description (each to be set out separately)..... Nothing

C—Stock in trade..... Nothing

D—Household goods, furniture, household stores, wearing apparel and ornaments of the person, viz..... 300.00

4 kitchen chairs.

1 sideboard.

1 ice-chest.

1 kitchen table.

1 cook stove.

5 dining chairs.

1 dining table.

1 rug 9 x 12—cotton.

1 “ 7 x 6—mixed.

1 “ 10 x 12—mixed.

1 “ 4 x 8—wool.

1 “ 10 x 28—wool.

3 wicker chairs.

2 small chairs.

1 rocker. [12]

Balance brought forward.....\$1,990.74

1 leather chair.

1 settee.

1 piano (bought 23 years ago).

1 large table (carpenter made).



1 lounge (old).	
4 bedroom sets and bedding.	
1 plush chair.	
E—Books, prints and pictures, viz.....	Nothing
F—Horses, cows, sheep and other animals, (with number of each), viz.....	Nothing
G—Carriages and other vehicles, viz.....	Nothing
H—Farming stock and implements of hus- bandry, viz.....	Nothing
I—Shipping and shares in vessels, viz.....	Nothing
J—Fixtures used in business.....	Nothing
K—Patents, copyrights and trademarks, viz.....	Nothing
L—Goods of personal property of any other description, with the place where each is situated, viz.....	Nothing

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\$1,990.74

PAT GIBBONS,  
Bankrupt.

**Schedule "B" (3).**

**Choses in Action.**

A—Debts due petitioner on open account:	
Due from F. H. Ketchum, lessee of coal land, about.....	\$ 250.00
B—Stocks in incorporated companies, inter- est in joint stock companies and negotiable bonds.....	Nothing
C—Policies of Insurance:	
Fire Insurance.....	None
D—Unliquidated claims of every nature, with their estimated value.....	Nothing

E—Deposits of money in banking institu-  
tions and elsewhere.....Nothing

PAT GIBBONS,  
Bankrupt. [13]

Schedule “B” (4).

Property in reversion, remainder, or ex-  
pectancy, including property held in  
trust for the debtor, or subject to any  
power or right to dispose of or to  
change.....Nothing

PAT GIBBONS,  
Bankrupt.

PROPERTY HERETOFORE CONVEYED FOR  
BENEFIT OF CREDITORS.

What portion of debtor’s property has been  
conveyed by deed or assignment, or other-  
wise, for the benefit of creditors; date of  
such deed, name and address of party to  
whom conveyed; amount realized there-  
from and disposition of the same, so far as  
known to debtor.....None

What sums of money have been paid to counsel,  
and to whom, for services rendered or to be  
rendered in this bankruptcy.....None

PAT GIBBONS,  
Bankrupt.

Schedule “B” (5).

A particular statement of the property claimed as  
exempt from the operation of the Acts of  
Congress relating to bankruptcy, giving each  
item of property and its valuation; and, if any

portion of it is real estate, its location, description, and present use.

Lots nineteen (19) and twenty (20), town of Renton; also household goods and wearing apparel as set forth in Schedule "B" (2).

Cash in lieu of livestock allowed as exempt under subdivision 4 of Section 563 of Remington & Ballinger's Code.....\$250.00

PAT GIBBONS,  
Bankrupt. [14]

**Schedule "B" (6).**

Books, Papers, Deeds and Writing Relating to Bankrupt's Business and Estate.

The following is a true list of all books, papers, deeds, and writings relating to the trade, business dealings, estate and effects, or any part thereof, which at the date of this petition are in my possession and under my control and custody, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage, and also of all others which have been heretofore, at any time in my possession or under my custody or control, which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.—

Deeds.—

Papers.—

PAT GIBBONS,  
Bankrupt.



Oath to Schedule "B."

United States of America,  
District of Washington,—ss.

On this 9th day of June, A. D. 1914, before me, personally came Pat Gibbons, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all the estate, both real and personal, according to the Acts of Congress relating to bankruptcy.

PAT GIBBONS.

Subscribed and sworn to before me this 9th day of June, 1914.

[Seal] LEROY V. NEWCOMB,  
Notary Public in and for the District and State of  
Washington, Residing at Seattle in Said State.  
[15]

Summary of Debts and Assets.

Schedule A-1	(1)	Taxes and debts due United States...	Nothing
"	" 1	(2) Taxes due States, counties, districts and municipalities .....	Nothing
"	" 1	(3) Wages.....	Nothing
"	" 1	(4) Other debts preferred by law.....	Nothing
"	" 2	Secured claims.....	Nothing
"	" 3	Unsecured claims.....	\$97,833.39
"	" 4	Notes and bills which ought to be paid by other parties.....	Nothing
"	" 5	Accommodation paper.....	Nothing
Schedule "A" Total.....			\$97,833.39

Schedule B-1	Real estate.....	\$1,017,000.00
" " 2-a	Cash on hand.....	1,690.74
" " 2-b	Bills, promissory notes and securities..	Nothing
" " 2-c	Stock in trade.....	Nothing
" " 2-d	Household goods, etc. ....	300.00
" " 2-e	Books, prints and pictures.....	Nothing
" " 2-f	Horses, cows and other animals.....	Nothing
" " 2-g	Carriages and other vehicles.....	Nothing
" " 2-h	Farming stock and implements.....	Nothing
" " 2-i	Shipping and shares in vessels.....	Nothing
" " 2-j	Fixtures used in business.....	Nothing
" " 2-k	Patents, copyrights and trademarks.....	Nothing
" " 2-l	Other personal property.....	Nothing
" " 3-a	Debts due on open account.....	\$
" " 3-b	Stocks, negotiable bonds, etc. ....	Nothing
" " 3-c	Policies of insurance.....	None
" " 3-d	Unliquidated claims.....	Nothing
" " 3-e	Deposits of money in banking institu- tions and elsewhere.....	Nothing
" " 4-	Property in reversion, remainder, trust, etc.....	Nothing
" " "	Property heretofore conveyed for benefit of creditors.....	Nothing
" " "	Paid to counsel in bankruptcy proceed- ings for services rendered and to be rendered .....	Nothing
" " 5	Property claimed to be exempt.....	250.00
" " 6	Books, papers, deeds and writing relat- ing to bankrupt's business and estate Books..... Deeds .....	
	Papers, ordinary letters and accounts relating to business.....	
Schedule "B" Total.....		\$1,019,240.74

[16]

[Indorsed]: Amended Schedules. Filed June 9, 1914, at 2 o'clock P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Feb. 9, 1915. Frank L. Crosby, Clerk. By B. E. Simpkins, Deputy. [17]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copies with the originals thereof in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same are true and perfect transcripts of said originals and of the whole thereof.

Witness my hand and the seal of said court, this  
11th day of February, 1915.

[Seal]

FRANK L. CROSBY,  
Clerk. [18]

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[Endorsed]: No. 2481. United States Circuit Court of Appeals for the Ninth Circuit. Mary L. Gibbons, Petitioner, vs. J. S. Goldsmith, as Trustee in Bankruptcy of the Estate of Pat Gibbons, Bankrupt, Respondent. In the Matter of Pat Gibbons, Bankrupt. Supplemental Transcript of Record on Petition for Revision and Transcript of Record in Support Thereof, Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to



Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Filed February 17, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

*In Re* PAT GIBBONS, Involuntary Bankrupt,

MARY L. GIBBONS,

*Petitioner,*

*vs.*

J. S. GOLDSMITH, Trustee in  
bankruptcy, of the estate of  
Pat Gibbons, involuntary bank-  
rupt, and PAT GIBBONS,

*Respondents.*

No. 2481

OPENING BRIEF OF PETITIONER

ISRAEL & KOHLHASE,  
*Solicitors for Mary L. Gibbons,*

207-8-9 Oriental Building.  
Seattle, Washington.

JOSEPH W. ROBINSON,  
*Of Counsel for Mary L. Gibbons.*

902 Lowman Building,  
Seattle, Washington.





IN THE  
**United States**  
**Circuit Court of Appeals**  
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rupt, and PAT GIBBONS,

*Respondents.*

No. 2481

---

**OPENING BRIEF OF PETITIONER**

---

**STATEMENT ON MERITS.**

1. Your petitioner seeks to review in these proceedings, the action of the United States District Court, of the Western District of Washington, Northern Division, in confirming certain orders of

the referee in bankruptcy, in the involuntary bankruptcy proceedings of Pat Gibbons, and in requiring your petitioner to propound her claim and establish her title to certain property and moneys, arising from the sale of the community real property of your petitioner and her husband, Pat Gibbons, based upon the following facts contained in the record.

2. In January, 1912, Pat Gibbons was adjudged an involuntary bankrupt, upon a petition of certain of his creditors. He was, at the time, the husband of this petitioner, Mary L. Gibbons, but she was not made a party to the proceedings by the creditors for bankruptcy, adjudicated against, nor was the community, consisting of Gibbons and his wife, mentioned therein, and the petition for involuntary bankruptcy referred only to Gibbons, as an individual, and to his debts. At the time of this adjudication as to Gibbons, he and your petitioner, his wife, owned and had owned for many years, prior thereto, 640 acres of coal land, described as Section 16, Township 21, North Range 72, W. N., situate in King County, Washington, upon which, there was a developed coal mine, known as the "Occidental Coal Mine", which coal mine was being operated by F. A. Ketcham, under a twenty-five years' lease to him,

by Gibbons and wife, dated November 30, 1910. Under the terms of this lease, the lessee was required to pay rentals by way of royalty for the amount of coal and other mineral products taken from said community lands, and provided for a minimum rental of \$2,500 per annum, payable quarterly. These lands containing the coal, were acquired during the married life of Gibbons and wife, through their joint efforts, and it is admitted in these records, that these lands and the coal taken therefrom was community property, one-half thereof, belonging to each member of the community, under the laws of the State of Washington, the title to which rested in the community, composed of the husband and wife, and that each member of the community had a vested right in and to one-half of this property, under the laws and the decisions of the court of last resort in the State of Washington.

Mary L. Gibbons, the wife, in no way consented, nor was she a party to the bankruptcy proceedings against her husband, Pat Gibbons. The trustee assumed that he had the right as trustee in bankruptcy, to the possession of this community real property, and took at least constructive possession thereof, caused the coal lands to be appraised in the



bankruptcy proceedings, and the appraisers valued the lands, regardless of the lease for the coal, at \$145,000 and the lands subject to the lease of the value of \$100,000, and also appraised a mile and a half of standard gauge railway, situate upon said land, and used in connection with the development of the coal mine, at \$6,000.

In June, 1914, the trustee in said bankruptcy's estate of Pat Gibbons, and without the community or the community estate being made a party to the bankruptcy proceedings and without notice to your petitioner, under order of the referee in bankruptcy, sold the coal lands herein described, for the sum of \$48,050, which was paid to the trustee in cash and received and retained by him as funds of the alleged estate of the involuntary bankrupt Gibbons. When the trustee qualified in the bankruptcy proceedings, upon allegations that he did not want to do any act to prevent him from repudiating the lease or denying the validity of the lease, and after he had taken such possession as he had of these lands, refused to accept the rentals earned under the lease, and the lessee thereupon, from time to time, as the lease required, paid in to the Seattle National Bank of Seattle, Washington, various sums of money, which the lessee paid as rent and royalty, under the terms of

the lease and at the time of the sale by the trustee of said coal mining property, this fund in the Seattle National Bank, amounted to \$8,174.51, which money still remains in the possession and control of said bank. After the adjudication of bankruptcy, various creditors of Gibbons proved their claims before the referee, but substantially all those claims filed by the creditors, was the separate indebtedness of the said Pat Gibbons, and not an indebtedness against the community consisting of Pat Gibbons and his wife, your petitioner. No attempt was ever made in this bankruptcy proceeding to determine the character of the claims proven as to whether they were the separate debts of Pat Gibbons, or community debts, nor was any attempt ever made to determine whether or not the community consisting of Gibbons and wife was bankrupt or insolvent, as distinguished from the bankruptcy or insolvency as to Pat Gibbons, as to his separate indebtedness, and no steps were taken to bring the community or the wife before the court in bankruptcy prior to the issuing of the show cause order.

3. In June, 1914, the trustee in the Pat Gibbons' bankruptcy proceedings, filed a petition with the referee in bankruptcy, setting forth that there had

come into his possession \$48,050, being the proceeds of the sale of these community coal lands, the same having been purchased by Dexter Horton Trust and Savings Bank; that the Seattle National Bank of Seattle, held at least \$8,174.51 paid into the bank by the lessee, by way of rents and royalties under the terms of the lease, as to the coal lands, which rent or royalty had been paid into the bank because the trustee refused to accept it and because the trustee did not then desire to recognize the validity of the lease, not so far as it effected or might effect the proceedings in bankruptcy against Pat Gibbons, and stating in his petition that he had now determined to accept this money paid into the Seattle National Bank, as rentals and royalty by the lessee, under the lease of Gibbons and wife, but the Seattle National Bank refused to pay these funds over to the trustee, alleging as a reason therefor that Mary L. Gibbons, (your petitioner), as wife of the said Pat Gibbons, the bankrupt, asserted some right, title, claim or interest in said funds, and alleging that he, the trustee, was advised and believed the facts to be that the said Mary L. Gibbons has no right, title or interest in and to said funds, derived from the sale of said property, then in possession and control of the trustee, or, in and to the funds in the possession of the



Seattle National Bank, and further alleged in his petition that notwithstanding his belief, that the wife had no interest in these funds, that it was advisable that some final determination be made by the referee in bankruptcy as to the rights of said Mary L. Gibbons in said money, if any she had, and prayed that a show cause order issue against the Seattle National Bank, requiring the bank to pay over the money to the trustee or show cause, why he should not do so, and also, for a show cause order, requiring Mary L. Gibbons, your petitioner, to appear and assert and propound to the referee in bankruptcy, any right, title, claim or interest, which she had or made or claimed to have in the moneys in the possession of the trustee and in the moneys in the possession of the Seattle National Bank, and provide that in case she failed so to do, that she be barred from any right, title or interest in and to such property.

On June 24, 1914, the referee in bankruptcy, based upon the trustee's petition, made an order, requiring that Mary L. Gibbons, your petitioner, as the wife of Pat Gibbons, the bankrupt, and as a member of said community to appear before the referee and assert and propound her right, title, claim or interest or whatever right, title, claim or

interest she had or claim in and to said lands and coal claims and the moneys mentioned in the petition, to-wit: the moneys for which the property had been sold, the rentals or royalty under the community lease paid into the bank, and the trustee caused this order and the petition to be served upon Mary L. Gibbons, personally.

4. On August 7th, your petitioner made her special appearance in answer to the show cause order or citation, and objected to the jurisdiction of the court, and sought to quash the citation because of lack of jurisdiction of your petitioner, or to hear or determine the subject matter, in so far as the property interest and rights of the petitioner were concerned. (See Trs., page 15.)

Her motion was overruled and she was ordered to file an answer, which she did, without waiving the special appearance and preserving her rights under her special appearance, which answer is found in the transcript, page 15.

In this verified answer, she denied the material allegations of the petition of the trustee, based upon which, the show cause order and citation were issued, and set up affirmatively, that all the property from which the funds in the hands of the trustee and in

the possession of the bank, had been acquired, was and at all times, during the existence of the bankruptcy proceedings, had been, the community property of herself and Pat Gibbons; she also alleged that long prior to the attempted sale of said property, she had filed in the County Auditor's office of King County, Washington, the county in which said lands were situate, under the provisions of the Washington statute, her claim of community interest in that property, and that substantially, the entire indebtedness alleged to be owing by the involuntary bankrupt, Pat Gibbons, and that all the claims filed or proven against the said bankrupt, were the separate debts of Pat Gibbons, and not an indebtedness of or against the community, consisting of Pat Gibbons and wife. The trustee filed a reply, denying the material allegations of the affirmative matters. (Trs., page 20.)

Without submitting or permitting any evidence in support of any of the issues presented by the petition, answer and reply, the referee entered an order, adjudging that the trustee was entitled to the sole possession and control of all the community property of Pat Gibbons and his wife, your petitioner, and the funds derived therefrom, both as to the sale of the property and the rentals under the



lease, and that all the community property and said funds were subject to administration and distribution in the bankruptcy proceedings, in such manner as the court might thereafter direct, and set the matter of administration and distribution for hearing before the referee, on August 13, 1914, and entered an order, directing that at such time, your petitioner, Mary L. Gibbons, appear and propound her claim and title, if any she had, in and to said moneys, so in possession of the trustee and the Seattle National Bank.

A petition for a review of the action of the referee in bankruptcy, in all these particulars, was filed before the District Judge, and was heard by him on August 28, 1914, and the District Judge filed a memorandum decision and thereafter an order and judgment upholding and confirming the orders of the referee in bankruptcy. (Trs. page 23-30.)

From this confirming order of the District Court the petitioner, Mary L. Gibbons, presents this application for revision of such order and the orders of the referee.

## ASSIGNMENT OF ERRORS.

## I.

5. The District Court erred in overruling the objections of the petitioner to the jurisdiction of the court in bankruptcy and in denying petitioner's motion to quash the order, requiring your petitioner, as the wife of Pat Gibbons, the bankrupt herein, to appear before the referee and assert and propound her title and claim to the property described in the order issued in the nature of a citation on June 24, 1914, and in holding that the petition, upon which, said order was based, was sufficient to give the court in bankruptcy jurisdiction of your petitioner, or her interest in said property, or of the community, consisting of Gibbons and wife, or the community property, or any portion thereof. (See Petitions and Order, Trs. pages 1-15.)

## II.

The District Court erred in confirming the referee's order adjudging that the trustee was entitled to the sole possession and control of the community property of Gibbons and wife, your petitioner.

## III.

The District Court erred in confirming the order of the referee, adjudging the trustee entitled to the sole possession and control of the funds derived from the sale of said community property of said bankrupt and wife, your petitioner, including the rentals and royalty for coal, under the lease of the lands, belonging to the community, on deposit in the Seattle National Bank, and deposited in said bank, by the lessee of the Occidental Coal Mine.

## IV.

The District Court erred in holding that all the community property, including the proceeds of sale and the royalties from coal, was subject to distribution in the bankruptcy proceedings, and in directing the Seattle National Bank to deliver possession of such funds in its possession to the trustee in bankruptcy.

## V.

The District Court erred in confirming the order of the referee in bankruptcy, as to the various matters set forth in the opinion of the court, based upon the petition to require your petitioner and said bank to appear and show cause why it did not turn over to the trustee, moneys in its possession, paid



into the bank by the lessee under the lease, and to require your petitioner to set forth and propound her title and claims to the community property, including the funds arising from the sale of the community real property by the trustee in bankruptcy and in and to the funds in the possession of the bank, by way of royalties for coal, taken from the community lands, as set forth in the memorandum decision, filed August 28, 1914, and the order based thereon, filed September 3, 1914. (See Opinion, Trs. pages 24-31.)

## VI.

The District Court erred in holding, as a matter of law, that the court in bankruptcy had jurisdiction of the person of your petitioner, or the subject matter set forth in the pleadings so as to give the court jurisdiction thereof, based on the facts set forth in the petition of the trustee, for an order requiring the bank and your petitioner to show cause, etc., (Trs. pages 7-14), and the answer of your petitioner thereto, (Trs. pages 15-19), and the reply of the trustee to the answer, (Trs. pages 20-21), and in holding that the court in bankruptcy had jurisdiction, either of the subject matter or of your petitioner or of said Seattle National Bank.

## VII.

The District Court erred in not holding that the community, consisting of Pat Gibbons and your petitioner, as such, had not been brought before the court, and in not holding that the court had no jurisdiction of the community or of your petitioner as a member thereof, or of Pat Gibbons, the bankrupt, as a member of such community, and in not dismissing your petitioner from such proceedings.

## VIII.

The District Court erred in upholding the legality of the sale by the trustee of the community property, and in adjudging that the court in bankruptcy had jurisdiction thereof.

## ARGUMENT AND CITATION.

6. In the State of Washington under the community system of ownership of property by husband and wife, there exists as to such husband and wife, three distinct estates.

First: The estate of the husband consisting of property acquired before his marriage and thereafter by gift, devise, or descent, which is his separate estate and in which his wife has no interest, and of

which he can make disposition and conveyance without his wife joining him.

Sec. 5915, *Rem. & Bal. Code Wash.*, Vol. 2.

Second: The separate estate of the wife, consisting of property owned by her at the time of her marriage, or subsequently acquired by gift, devise, or descent, which estate can be conveyed by the wife without her husband joining, and over which the husband has no control.

Sec. 5916, *Rem. & Bal. Code Wash.*, Vol. 2.

Third: The community estate consisting of property acquired by either husband or wife or jointly through earnings of both or either and the accumulations from funds derived therefrom, which can only be encumbered or conveyed by the joint deed of a husband and wife. All attempts to convey or encumber the same by either the husband or wife alone, are null and void.

Sec. 5917, *Rem. & Bal. Code Wash.*, Vol. 2.

7. The community property law of the State of Washington has been the cause of much litigation, ever since its enactment in 1879, but there are certain propositions of law with reference to which, there is no longer any dispute, either in the State or Federal Courts, and among these, are:



(a) That the community, consisting of the husband and wife, is a compound creature of statute, capable of acquiring, owning and disposing of property, real and personal, and represents unity, and that nothing but death or divorce can dissolve this community.

(b) That the property it acquires is known as the community property, and the title thereto is not blended in its members, "not united merely, but unified, not mixed but identified", and that neither member of such community, acting independently, can affect the status of the community real property; that is to say, neither member of the community can separately convey, or contract to convey or mortgage or create a lien against the community real property, and that any attempt to do so, is utterly void. That to do so lawfully or affectively, the community itself must act, or ratify.

(c) That the one-half interest held by each member of the community, in all the community property, both real and personal, represents a fixed, vested right of property, and that the one has no different or larger proprietary interest in such property, than the other.

(*d*) That under this statute, the separate debts of neither the husband nor wife, can be enforced against the community real property at all, nor against the husband's interest therein.

(*e*) The legislature saw fit to clothe the husband with reference to the personal property of the community with the power of sale, the same as of his own separate property, and made the husband the trustee of the community, as distinguished from the community itself, with reference to the management of the community personal property.

But this power ceases the moment the community personal property is converted into cash, when the wife has the right as a member of the community to be heard with reference to its use.

(*f*) Each member of the community has the lawful right to do business for himself or herself, independently of the community, or the community relations, and as such, may acquire separate property and create separate debts, as though the community itself did not exist.

The community property law of the State of Washington is different in many essentials from the community property laws in other states, and any decision relating to this subject matter, from Cali-

ifornia or any of the other community property states, is of slight value, by reason of these distinctions.

For instance, in the State of Washington, our community property law, gives to the husband and wife, a vested right of property, and the interest of the husband and wife are not only equal, but unified, not mixed or blended, but identified, and we call the court's attention to the case of *Holyoke vs. Jackson*, reported in

3 Wash. Territory, 235,

in which, the principal opinion was written by the then Chief Justice Greene, one among the ablest jurists in the Northwest, and, in speaking of this community and its similarity to co-partnership, the court said:

“A conventional community, in a state where statutes would permit, might be contrived which would be substantially a partnership; but an ordinary legal community is, in many important particulars, quite distinct. It is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both, a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape



from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*,—a creature of the statute. By virtue of the statute, this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband, and lay it upon husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate', bestowed by the ninth section of the act of 1873, was a mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done. When, therefore, in 1880, the plaintiff in error, without

his wife, entered into an agreement to sell the land in question, he agreed to do what he himself, by himself, could not do, and therefore could not agree to do. To make an actual sale or conveyance without his wife, he had no power. The law says such a thing shall not be done. An agreement proposing it is in conflict with the law, and void."

Judge Hoyt said:

"By section 8 of the statute of 1879, the husband is clothed with a certain trust in respect to community real property. The management and control of it is vested in him, not for himself, but for the community. Besides this, he with the wife, is endowed with power to dispose of it. This power, too, is in trust for the community, for we must distinguish the community called into existence by the statutes from the two individuals who composed it. By a like distinction, a corporation is conceived to differ from its stockholders. \* \* \* In the matter of disposing of community real property, husband and wife are, by the law of 1879, joint trustees for their mutual benefit in the community. Within the scope of their joint trust, neither can act without the other. No contract of disposition undertaken by either husband or wife, in contravention of his or her fiduciary relation to community real property, can be enforced so as to reach any such property, directly or indirectly."

And these words were cited with approval by the United States Supreme Court, in

*Warburton vs. White*, 176 U. S., 484.

9. We submit the broad proposition, that under the Washington community property statute, the real property belonging to the community, cannot be incumbered or its condition changed in any manner, directly or indirectly, so as to deprive either member of the community, of his or her vested rights therein, except by joint action, or by reason of some form of due process of law, by a court of competent jurisdiction, and that there is no power lodged with the referee in bankruptcy, under the bankruptcy law, to turn aside or ignore this provision of protection to the petitioner. That aside from the mere management of estates lawfully brought into the bankruptcy court, it has no power to substitute by any show cause order or citation, or any other process, the community or your petitioner, as a member thereof, which will bring into the bankruptcy proceedings, such community or your petitioner, for the purpose of determining the rights of property of the community, or her vested rights in this property, or for the purpose of determining the community debts, except upon process issued by the court in the nature of original process in a suit between the proposed parties, for that purpose.

We submit, as a proposition of law, that before the court in bankruptcy inquires into the community



property or disturbs the petitioner's vested right in this property, it must have jurisdiction of the community and then, it must be lawfully established, that the community itself, is insolvent, and there is no presumption that any debt is a community debt, in the sense of the bankruptcy statute. Such an insolvent proceeding, as we find here, under the community property statute of the State of Washington, and where the creditors proceed only against one member of the community and not against the community, there arises by law, two presumptions, one, that the insolvency proceedings relate only to the separate debts and property of the involuntary bankrupt named, and, second, that there are no community debts and that the community, itself, is solvent, else the community would have been brought into the bankruptcy proceedings originally.

Again, until it has been made to appear affirmatively that there are sufficient community debts to make the community insolvent and until each member of the community has been brought before the court by the usual process, the question of the insolvency of the community is not involved, and when involved and properly before the court, as against a charge of insolvency, your petitioner and the community would have the right to plead sol-

vency of the community, and upon such plea the community and your petitioner would be entitled to a jury, as to the question of the insolvency of such community.

But, upon the face of these proceedings, the value of the property, the amount of cash in the hands of the trustee and deposited in the bank, accruing from sale and rentals of admittedly community property, are sufficient to show that the community is solvent, and if solvent, the court in bankruptcy has no jurisdiction, and cannot secure jurisdiction, except the insolvency of the community be established in the manner contemplated by the Act of Bankruptcy of 1898.

10. We contend that in principle, Sub-section G., of Bankruptcy Act, applies to the "community" in the same sense and with the same particularity as though it were a co-partnership, and this sub-section authorizes the court in bankruptcy to marshal and distribute the assets of the co-partnership estates and individual estates, but Sub-section H provides in substance that when one or more, but not all the members, of a co-partnership is an adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent

of unadjudicated partners, and this provision is clearly for the purpose of enabling the solvent partner to settle the partnership business, outside of bankruptcy, and the consent required here, is required to prevent bankruptcy proceedings in just such a case as this, where the proceeding in bankruptcy, is against one or more of the partners, but not against the co-partnership. See the cases of

*In re Meyer*, 2nd Circuit C. C. A., 98 Fed., 276;

*Dickas vs. Barnes*, 6th Circuit, C. C. A., 140 Fed., 849.

This law has been construed absolutely to prohibit bankruptcy without the consent of the adjudication by an individual partner and

*In re Bertenshaw*, 8th Circuit, C. C. A., 150 Fed., 363,

the court said:

“No express provision can be found in the legislation and no indication or implication is presented it, that the adjudication of a partnership draws into the administration of an estate in the court of bankruptcy, the property of the solvent partners who were not adjudged bankrupt.”

In all proceedings in bankruptcy, against one member of a partnership, as this bankruptcy proceeding is against one member of the community, the



adjudication in bankruptcy cannot be maintained, unless all the members of the co-partnership are insolvent, because insolvency is the essential element in the act of bankruptcy to give the court jurisdiction.

Collier, on bankruptcy, 10th edition, 1914, page 152, in speaking of this question, says:

“Where the assets of a partnership, together with the individual properties of each partner, exceeds their liabilities, the partnership is not insolvent.”

*In re Perley*, 138 Fed., 927.

In the case of

*Francis vs. McNeal*, 3rd Circuit, C. C. A. 186, 481,

the Circuit Court of Appeals said:

“A partnership cannot be adjudged bankrupt in an involuntary proceeding, unless it has committed an act of bankruptcy. If the action judged, be one involving insolvency, since every partner is liable in *solido* for all the partnership debts, the adjudication against the partnership must be based upon the allegations and provisions that the assets of its members in excess of its individual debts, plus the assets of its partnership, are insufficient to pay the partnership debts, otherwise, there is no partnership insolvency, notwithstanding the entity doctrine.”

Here, we have the involuntary bankruptcy of Pat Gibbons, a member of the community, being a creature of statute, as a co-partnership is a creature of agreement, in which neither member of the community has consented to the bankruptcy proceedings; in which only one member of the community was before the bankrupt court; in which it affirmatively appears that *substantially* all the debts by reason of which Pat Gibbons was adjudged a bankrupt, were the separate debts of the bankrupt, for which the community property is *not* liable; in which the community, itself, is affirmatively shown to be solvent, and not insolvent, because the record discloses that the aggregate of the debts proved against Pat Gibbons, the bankrupt, amount to \$97,833.39, the value of the property as appraised is \$145,000 independent of the lease, and subject to the lease, appraised at \$100,000, and the railway on the land used in connection with the coal mining operation, appraised at \$6,000, so that we have the community estate appraised at \$151,000, which was done by appraisers appointed in this bankruptcy proceeding, and hence officers of the court, and for this purpose must be accepted as its value under the Bankruptcy Act, so that upon the face thereof, the value of this community property is \$53,000 in excess of the aggregate

of the *separate* debts and the *community* debts and this fact admitted upon the record, that *substantially* all this \$97,883.39 of debts are the separate debts of the bankrupt.

11. Under the conditions existing here, and the uncertainty of what the purchaser by way of title would receive, at such a sale, the community property sold at \$48,050, thus wiping out property appraised at \$151,000 for a nominal sum, and thus the record establishes the reason and the justice of the law, which requires that the community be affirmatively shown to be insolvent before its property can be sacrificed in any such a manner and we submit that such a proceeding as we have here, and the exercise of the powers of the court of bankruptcy in the manner it was exercised here, so clearly results in confiscation of property and its value that the reason for the law, as herein contended for, proves its necessity. Here, we have the community and the community property, in which, your petitioner has a vested one-half interest, and of the value of \$151,000, taken away from her without notice, sold under an order in a proceeding to which she was not a party, reducing the value of her estate without her being before the court in excess of .....



per cent, and if upheld by the courts, it results in the taking without any process whatever against your petitioner, her vested rights in property, the appraised value of which, is more than \$75,000, and she is asked to accept in lieu of this \$75,000, \$24,025, less than one-half its appraised value and hindered with the expenses and costs of insolvency to the amount of thousands of dollars, and because to the end that the creditors of Pat Gibbons has filed an involuntary petition in bankruptcy and established debts without regard to the community and without regard to your petitioner, and without regard to the debts of the community or the debts of your petitioner, and passed over to the purchaser of such property, more than \$50,000 worth of her property, without your petitioner having her day in court, as to the debts, the amount or their character, and without regard to the solvency or insolvency of the community as such and so far as she is concerned without having heard her as to the necessity for, or of the sale or without reference to any other rights, relating to her property.

12. And, after this has been done without notice to her, without the consent of either member of the community, and after the sale has been made and

the proceeds of sale paid into the hands of the trustee, in a proceeding to which she was not a party, and not until the court is ready to distribute the proceeds of the sale to the creditors of the bankrupt, is she invited to come in and show what claim or right or title she has or claims or claimed, in and to said property already sold. If that be the law, then no milder term can be applied to it than robbery.

These creditors might have filed an involuntary petition in involuntary bankruptcy against this community composed of Pat Gibbons and wife, and alleged the insolvency of the community and its members and that these debts were in part or wholly community debts, showing the items of each, and thus brought the community together with the other individual member thereof before the court in bankruptcy and required the community to meet such petition; but in doing so these creditors would have at once forced the proposition of establishing at the threshold of the proceedings the fact that the community was insolvent and unable to pay its debts, for which the community property was holden. So we think it is to be presumed from all these facts that these creditors knew that this community was *not* insolvent and that if they started the machinery in

the court of bankruptcy, the fact presented to the court by the community would instantly stop such machinery and deprive the court of bankruptcy of jurisdiction; and evidently these creditors must have concluded that your petitioner was ignorant of her rights or might overlook them, and that by this procedure a \$150,000 community estate would be grabbed for a nominal sum to pay separate debts of the bankrupt and that your petitioner might, in some way, be estopped from questioning the sale, after the distribution of the funds had been made; but fortunately for her, the trustee at first refused to accept the rentals under the lease of this community property and thus compelling the lessee, in good faith and to protect his lease, to pay the money over to the bank; and there it remained deposited until the community property was sold and the trustee had the \$48,050 in his possession and desired a distribution when he undertook to say to the bank, "I will now accept that deposit and we will let it all be distributed at the same time". But just here, the bank, recognizing the community interest of your petitioner and the community character of such funds in its possession, was immediately confronted with its liability to the petitioner in the event it permitted the money to be turned over to the trustee and



refused to pay the money to him. The trustee and these creditors were thus forced, from the necessity of these circumstances, before going any further to attempt to bring your petitioner before the bankruptcy court in these bankruptcy proceedings.

13. It has been clearly established by the Federal Courts, by the great weight of authority, both as to results and as to the reasoning upon which it is based, that the adjudication of individual members of the partnership does not draw into the bankruptcy proceedings the assets of the partnership, of which the bankrupt is a member, but against which no bankruptcy proceedings are pending.

*In re Mercur*, 3rd Circuit, C. C. A., 122, Fed., 384. (Reported in 56 C. C. A., 472)

in which, the court used this language:

“There has been no adjudication against the firm, the trustee was not appointed to represent it, but only the one member who happened to oppose it in their separate and individual capacity. Under such circumstances, the trustee has no authority to interfere with the firm assets.”

14. This creature of the Washington community property statute is dissolved only by death or divorce, and if by death, then the estate could not be

administered upon, in bankruptcy, but would require to be administered under the probate laws, and if dissolved by divorce, the property question, the payment of the community debts, as well as the separate debts and the distribution of the property, is taken care of in the decree of divorce. Therefore these questions effecting the community as such and the rights of your petitioner in this community property can only be determined when the community is before the Court of Bankruptcy and then only when such community is shown to be insolvent.

15. Section 70 of the Bankruptcy Act provides that the trustee, upon his qualification, shall have been vested by operation of law with the title of the bankrupt, which, prior to the filing of the petition could have been "sold under judicial process against him," sec. 36, *U. S. Stat. at large* 838. *Collier on Bankruptcy*, pg. 987, and this, we submit is a limitation of his right of possession and control, and ought not to be enlarged by judicial construction so as to include property claimed by others, and this section is to be construed particularly with regard to individual bankrupts, and not to property in which such bankrupt may have an interest as a member of a co-partnership, or of a community, under the community property laws. The said courts, as shown in this brief, have drawn the line very strictly,

between property owned by an individual, and property owned by a co-partnership.

Under the Washington statute, execution could not be lawfully levied against the community, for the bankrupt's debts, and Pat Gibbons' interest in the community property could not be sold under judicial process against him alone, until the wife, the other member of the community, had her day in court, and not until it had been judicially determined that the debt for which the property was to be sold, was a community debt, and the Supreme Court of the State of Washington, has, at no time, disputed this proposition.

In *McDonough vs. Craig*, 10 Wash., 244, the court said:

“That the *prima facie* conclusion following from the rendition of the judgment, can only be made judicially conclusive by some action to which the wife is a party is too evident to require argument. From which it would follow that not only the rights of the creditor, but those also of the husband and wife as members of the community, would be best subserved by having the *prima facie* presumption made conclusive, at the earliest possible moment. \* \* \* It necessarily follows that the plaintiff is entitled to have his judgment show upon its face the fact that it is for a community debt. Otherwise, it would not appear therefrom, that it was a lien upon community property.”



And we submit that judicial process mentioned in Section 70 above, must be such a process as in effect in law creates a lien upon the community property, and such a lien in the nature of a judgment can be created only when the community itself is before a court of competent jurisdiction, and it be judicially determined that the debt for which the property is to be sold under judicial process, is a community debt, and this same doctrine has been upheld and reaffirmed in the following cases from the Supreme Court of the State of Washington:

*Powell vs. Nolan*, 27 Wash., 318.

*Sloane vs. Lucas*, 37 Wash., 348.

*In re Steyer*, 98 Fed., 290.

Section 5918, *R. & B. Code of Wash.*, reads:

“The husband has the management and control of the community real property. All such community real property shall be subject to liens of judgments recovered for community debts, and to sale on execution issued thereon.”

Can it be reasonably argued from this record, that the community character of any of the debts mentioned or proved in the involuntary bankruptcy proceedings of Pat Gibbons, constituted in effect, judgments recovered for community debts? The court will remember that there is no mention made in the involuntary petition for the adjudication of

the bankruptcy of Pat Gibbons, and nowhere in the record does it appear that the question as to whether or not any of the debts were community debts of Pat Gibbons and your petitioner, was ever considered. This section of the Washington statute provides that community property can only be sold upon execution to satisfy liens of judgments recovered for community debts, and Section 47 of the Bankruptcy Act vests the trustee only with the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceeding thereon, or an execution duly returned unsatisfied, and throughout these provisions of both the state statute and the Act of Bankruptcy, the necessity for a judicial determination that such a debt is a community debt, is ever present, and it must necessarily follow that that question cannot be adjudicated or made effective against the wife, unless she is a party.

Two fatal objections appear upon the face of this record: to the right of the trustee to sell the community real property, and which is involved in the money accruing therefrom, to-wit: the fact that no claim is made that any one of the debts was a community debt, and second, the absence of one member of the community, which would forbid a judicial determination of that question, effective against the community.

16. In holding that the District Court, exercising its powers in these bankruptcy proceedings, had authority to compel your petitioner by citation to come into the proceeding and submit to the jurisdiction thereof and have her property rights determined herein, the court finally rested such decision upon the proposition that the Supreme Court of the State of Washington had held "*that an execution issued on a judgment obtained against the husband for a community debt may be levied upon community real property,*" and from this statement concluded that these creditors in filing herein an involuntary petition in bankruptcy against Pat Gibbons, placed the community property and the rights of your petitioner in the same adjudicated condition as if the creditor had obtained judgment against the husband, Pat Gibbons, for a community debt; but, we submit, first, that this doctrine announced by the District Court is not in point and is not applicable to this proceeding. In the first place, it is an involuntary bankruptcy proceeding and no authority can be pointed out under the bankruptcy act of 1898 which gives this force and effect to an involuntary bankruptcy proceeding against the husband.



The cases from the State of Washington, relied upon by the District Court, are as follows:

*Curry vs. Catlin*, 9 Wash. 495.

*Horton vs. Donahue-Kelly Banking Co.*, 15 Wash. 399.

• *Allen vs. Chambers*, 18 Wash. 341.

*Thygesen vs. Neufelder*, 9 Wash. 455.

But an examination of each of these cases will, we think, convince the court that the District Court was in error in holding that these decisions were controlling here.

In the *Curry* case both members of the community and hence the community itself were parties to the suit in the Superior Court brought to enjoin an execution issued on a judgment obtained against the husband based upon a promissory note signed by the husband alone, where the execution was levied upon real property standing in the name of the wife on the records, and this action was consolidated with an action instituted by one Catlin against the wife and her husband to subject certain alleged community lands standing in the name of the wife alone, to the lien of the judgment rendered against the husband for a community debt, and the issue tried out was whether or not such lands were the separate lands of the wife, or the lands of the

community, and the court held that such lands were community lands, but the decision was rendered in the case of *Catlin vs. Curry*, being the action to subject certain lands alleged to be the separate lands of the wife, community lands and hence subject to execution for a community debt which had been duly established as such in the Superior Court upon process against the community, and to emphasize our contention that before an execution, based upon a judgment against one member of the community, can be levied upon community real property, the Honorable John P. Hoyt, then a member of the Supreme Court (and at the hearing herein the referee in bankruptcy), in a concurring opinion on page 499, said:

“I agree with the conclusion of the majority as to the merits of the controversy, but I cannot assent to that part of the opinion in which it is stated that the complaint of Catlin, by which he sought to have an adjudication that his debt was one which could be enforced against community property, did not state a cause of action; for while it is true that the presumption that it could be so enforced, yet the fact that such presumption is only a *prima facie* one, might largely effect price which would be realized upon a sale of the community property to satisfy the judgment. The plaintiff should have the right to have the status of his judgment conclusively established before the sale of community property thereunder.”

The *Horton* case was one involving the liability of the community for an obligation of suretyship incurred by the husband on behalf of a corporation in which he was an officer in order to protect the property and business of the corporation, and it was held that presumptively in doing so he was acting for the community, and that it was a community debt, and again, we have all the parties in interest before the court brought in by the usual process.

In the *Allen* case all the parties in interest were before the court by the usual process. The action being in the Superior Court of Washington to recover for a debt upon which a member of the community was only a surety. The defendants, including the community of Chambers and wife, set up affirmatively in their answer that the money secured on the note was for the benefit of and used by the Light and Power Company, a corporation, but the court entered judgment against the defendants, including the community for the amount found due, but made an order staying the issuance of an execution until the plaintiff had recovered judgment against that corporation and by levy exhausted its property, thus entering a restricted judgment, which the Supreme Court reversed and directed the restrictions to be omitted. In that case your Honors



will see that it was a judgment in a court of competent jurisdiction against the community, and in the case being discussed the judgment was held to be a lien upon the community real property of Chambers and wife, but before the execution was levied the community conveyed the property to a third party, and the execution was issued and returned "no property found." Thereupon the judgment creditor filed this action against Chambers and wife, Frost and wife and the representatives of the deceased, to whom the title had been conveyed, asking to have the judgment adjudicated a lien upon the real property of Chambers and wife conveyed and to set aside the conveyance and require the property to be subjected to sale and satisfaction of the judgment, and this decision clearly upholds the principles of law for which we contend here. That there may be a judgment against one member of the community for a community debt, but before execution may be levied upon the community property and the same sold, the other member of the community must have her day in court.

The *Thygesen* case is the one upon which the District Court seems finally to have rested its right to subject the community party of Gibbons and wife to the administration of the court in bankruptcy in

this proceeding, and in that case the husband, Thygesen, made and filed in the Auditor's office in Whatcom County, Washington, a deed of assignment responsive to the provisions of the insolvency statute, enacted by the legislature of the State of Washington, March 6, 1890, naming an assignee, who failed to qualify, and Neufelder, under the provisions of the statute, was appointed by the Superior Court and qualified as such assignee, and as such he collected certain moneys due upon a lease, which had been executed by Thygesen to Brown & Carter, and thereafter Thygesen and his wife filed their petition in the court, seeking to have the assignee account for and pay over to them the money collected by him under the lease, instead of distributing to the creditors.

There your Honors will see that the deed of assignment was the voluntary act of the husband and that the community thereafter voluntarily submitted to the jurisdiction of the court in that proceeding. The trial court granted the petition but the Supreme Court reversed and dismissed the petition, but no disputed question of fact was presented in that case. The court said:

“It is conceded that the real estate for the use of which the rent was paid, was community property, and it is also conceded that the debts

which have been proved in the insolvency proceeding were those of the community. If the deed of assignment executed by the husband alone is to be construed as a conveyance of the property therein described to the assignee named therein for the purpose of having it applied to the payment of his debts, it is clear that it could not have force so far as the community property is concerned. In other words, if the assignment therein made is to be treated simply as a conveyance at common law and the provisions of our statute applied thereto, in aid of the common law assignment to be created, the property of the community could not be conveyed thereby."

So that your Honors will see that this case, relied upon by the District Court, is not in point and is not analagous, and the very questions of disputed facts here were admitted there, and again, it will be noticed that the Supreme Court in that case was construing a statute enacted in aid of the common law assignment. The assignment by the husband was made voluntarily, but the assignee failing to qualify, another was appointed under the provisions of the law by the Superior Court in a proceeding regularly instituted for that purpose under the insolvent state law, and thereafter the community submitted itself to that jurisdiction and invoked the jurisdiction for relief, and we ask the court to carefully read this decision, and while considering it



the court will recall the fact that this decision, its meaning and effect, must be determined with reference to the Act of the State of Washington, entitled "An act to secure creditors a just division of the estates of debtors, etc.," Session Laws 1889-90, 83, and while we have never been able to fully comprehend the logic of a portion of this decision, particularly relating to the distinction between a deed of assignment and a conveyance, still we insist that this decision ought not to be controlling in these proceedings, even though given the full force and effect accredited to it by the District Court; that decision was not made with reference to any Federal Bankruptcy Act, under which we now look for the powers of the District Court in its administration of the estate of insolvents. In that case not only were all the parties in interest before the court by consent upon the community's own motion, but nowhere was the question of the solvency or insolvency of the community or the other member of the community presented or involved, and we cannot believe that the Supreme Court of the State of Washington would now hold, or ever did hold, that an involuntary petition in bankruptcy as to one member of the community, without mentioning or attempting to bring before the court any community debts, consti-

tutes in effect and in law under the Washington community property law, a judgment based upon which the trustee in bankruptcy might sell the community property as the same might be sold upon execution based upon a judgment in a suit wherein it had been adjudicated that the debt was a community debt and constituted a lien against the community property.

We respectfully submit that the action of the District Court should be reversed.

ISRAEL & KOHLHASE,  
JOSEPH W. ROBINSON,  
*Solicitors for Petitioner, Mary L. Gibbons.*

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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MARY L. GIBBONS,

*Petitioner,*

*vs.*

J. S. GOLDSMITH, as Trustee in  
Bankruptcy of the Estate of PAT  
GIBBONS, Bankrupt,

*Respondent.*

No. 2481

---

IN THE MATTER OF PAT GIBBONS,  
BANKRUPT.

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SEPARATE BRIEF OF THE  
DEXTER HORTON TRUST & SAVINGS  
BANK, A CREDITOR.

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CLISE & POE,

*Solicitors for*

Dexter Horton Trust & Savings Bank.

405 New York Building,  
Seattle, Washington.





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SEPARATE BRIEF OF THE  
DEXTER HORTON TRUST & SAVINGS  
BANK, A CREDITOR.

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PRELIMINARY STATEMENT.

Upon the authority of *In re. Lane Lumber Co., Hirlinger vs. Boyd*, 217 Fed. 546, decided by this court on August 17, 1914, we deem it our duty to suggest that appeal is the exclusive remedy and that your honors have no authority to review the judgment in this proceeding.

Respectfully submitted,

CLISE & POE,

*Solicitors for*

Dexter Horton Trust & Savings Bank.

## STATEMENT UPON THE MERITS.

While presenting various aspects the broad question to be determined is whether the District Court erred in holding that under the community property laws of the State of Washington the bankruptcy of a married man vests the trustee in bankruptcy with title to community property to the extent that the same may be sold and the proceeds devoted to the payment of community debts. The courts of Washington having uniformly held that all property standing in the name of either spouse is presumed to belong to the community and that all debts contracted during coverture are *prima facie* community obligations.

Counsel has wandered somewhat afield in his statement and argument and we feel that a clear understanding of the issues requires a brief re-statement of the facts as they appear from the record before you.

Pat Gibbons was adjudged bankrupt by the District Court of the United States for the Western District of Washington, Northern Division. At the time of the adjudication, and for nearly thirty years prior thereto, he and appellant were man and wife and residents of King County, Washington. As such they composed a community under the laws of

the state, but Mrs. Gibbons was not joined as a party defendant in the bankruptcy proceedings.

Numerous claims aggregating more than \$100,000 were filed and allowed. The largest of these was the claim of the Dexter Horton Trust & Savings Bank, which had been duly reduced to judgment in the local courts some time prior to the adjudication.

The assets scheduled consisted of several items, but were unsubstantial, with the exception of the coal mine described by counsel, which was subject to the lease referred to by him, and certain rents or royalties payable thereunder amounting to \$8,174.51. These rents or royalties had been paid by the lessee to the Seattle National Bank for the benefit of the trustee, because the latter had contemplated resisting the validity of the lease and did not care to jeopardize his rights by permitting the lessee to attorn to him.

On June 19, 1914, all of the assets were offered for sale and purchased by the Dexter Horton Trust & Savings Bank, which paid \$48,050 spot cash therefor. This sale was duly confirmed and we do not understand that its regularity is questioned. In any event no appeal was taken therefrom or any objection interposed.



When the sale had been completed and the purchase price paid the bankrupt's estate had been "reduced to money" and was in a condition to be closed. It then became necessary for the trustee to withdraw the royalties of \$8,174.51 from the Seattle National Bank in order that they might be distributed with the rest of the estate. When he attempted to do so, however, the bank declined to pay, basing its refusal upon the fact that appellant had asserted some adverse claim to the fund.

Thereupon the trustee filed his petition in the District Court praying for an order directing the bank to show cause why it should not pay the money and requiring appellant to appear at the same time and propound any claim which she might have to the royalties and also to the purchase price paid by the trust company (R. p. 7).

An order to show cause was issued upon the petition and duly served upon the bank and Mrs. Gibbons. The latter in response appeared specially, objected to the jurisdiction and moved to quash the citation or order to show cause (R. p. 15). These motions were both overruled, whereupon she answered, but still insisted upon her special appearance.

Among other things her answer contained an affirmative defense alleging in effect: (a) That all

their property belonged to the community; (b) that substantially the entire indebtedness was the separate indebtedness of her husband and not of the community; (d) that the claim of the Dexter Horton Trust & Savings Bank was likewise the separate indebtedness of Mr. Gibbons, save that thirty thousand thereof was not even owed by him at all, but was the separate indebtedness of N. H. Latimer and C. E. Burnside. The length to which appellant seems willing to go and the absurdity of the propositions to which she seems willing to subscribe, are well illustrated by this last allegation as the claim of the trust company had been reduced to judgment in an adversary proceeding before a court of competent jurisdiction several years before, and the judgment there entered is clearly *res adjudicata*.

A general denial was filed by the trustee by way of reply to this answer, which put in issue all its affirmative allegations, including the character of the claims filed. Appellant offered no proof and the Honorable John P. Hoyt, then referee in bankruptcy, upon the issues as framed entered an order adjudging all the assets to be the property of the community composed of Mr. and Mrs. Gibbons; that some if not all the claims proved were actually community debts; that the rest were presumptively so;

and that the trustee was entitled to the sole possession of the community property and of the funds derived therefrom.

This order was supported by a written opinion, which we print below, because Judge Hoyt as a member of the State Supreme Court and as referee in bankruptcy since the creation of that court in this district, has had an unrivaled opportunity to observe, and by his decisions aid in the development of our community law since Washington became a State.

“From the facts disclosed by the pleading herein, the funds as to which the controversy relates are all the proceeds of property belonging to the community composed of the bankrupt and his wife, Mary L. Gibbons, and the question as to the right to the proceeds is being waged between the trustee and the said wife. It follows that if the trustee has the right in this proceedings to take possession of the community property, that as between such trustee and said Mary L. Gibbons, he, the said trustee, is entitled to the possession of the funds in question, and such possession cannot be interfered with in the interests of the wife. This being so, but one question is presented for the decision of the Referee, and that is, as to whether or not the bankruptcy proceeding against the husband alone brings into the possession of the court the estate of the community composed of the bankrupt and his wife. This question, so far as the Referee is advised, has never been decided squarely in a contested matter by the Federal



Courts in this district. The practice, however, has been for the trustee in a bankruptcy proceeding instituted by or against the husband alone to take possession of the community property and administer it in the proceeding, ever since the enactment of the present Bankruptcy Law, and while this practice would not necessarily determine the law, it should have much weight in determining the question presented if it was a doubtful one, and this custom so long followed would make it the duty of a Referee in Bankruptcy to adhere thereto, unless clearly satisfied that it was unwarranted under the statute.

“The Referee before whom this question is pending is not only not satisfied that this custom has proceeded upon an erroneous view of the statute, but he is of the opinion that no other construction of the statute could be possible under the decision of the Supreme Court of this State. So far as he is advised, it has always been held by such court that a judgment against the husband was *prima facie* a judgment against the community and could be enforced against community property, and if such would be the force of a judgment against the husband alone, it seems clear that a proceeding in bankruptcy against him alone would authorize the taking into the possession of the court of all the community property. Said court in Ninth Washington expressly held that a proceeding in insolvency by the husband alone brought into the possession of the court the community estate, and so far as the Referee is advised, this decision has never been in any way overruled or modified, and if such was the effect of a proceeding against the husband alone under the State Insolvency Statute, there seems to be no

good reason why such is not the effect of a proceeding by or against him under the Bankruptcy Act. The question is not now presented as to the distribution of the funds derived from the community estate in the possession of the trustee. In such distribution it may be necessary for the court to determine the *status* of the claims filed and allowed in the proceeding as claims against the community, or against the separate estate of the husband. As stated before, this question is not now before the Referee, and he being of the opinion that the trustee in the proceeding is entitled to all the community estate, or the funds derived therefrom, must decide that as between the trustee and the wife of the bankrupt, the trustee is entitled to the sole possession of all community property, or the funds derived therefrom.

“An order may be prepared and submitted adjudging the trustee entitled to the possession and control of all the funds in question.

“Dated at Seattle, in said District, this 21st day of July, 1914.

“Referee in Bankruptcy.”

Upon the entry of the order last referred to, appellant obtained a review by the District Court, Judge Neterer presiding, who affirmed the Referee, directed him to proceed with the administration of the estate, and filed a written opinion which appears at page 26 of the record.

From this order appellant comes here. Her grievances as we understand them are covered by

paragraphs twelve and thirteen of her petition for review and are that the court had no jurisdiction or authority to : (1) order the sale which is therefore invalid; (2) direct the Seattle National Bank to pay the royalties of \$8,174.51 to the trustee; (3) direct the trustee to proceed with the administration of the estate and distribution of these royalties and the purchase price of \$48,050; (4) direct appellant to propound her claims, as her rights could only be adjudicated by a plenary suit in the Superior Court of the State of Washington for King County.

### ARGUMENT.

Objections two, three and four can be answered by merely calling attention to the fact that the sums in dispute are not only constructively but actually in the custody of the bankruptcy court—the purchase price, through the possession of its right arm, the trustee—the royalties, because the payment by the lessee to the Seattle National Bank, for the account of the trustee, was in effect and in fact a payment to him, as the bank immediately became his agent.

*Mueller vs. Nugent*, 184 U. S. 1, (46 L. Ed. 405.)

That physical possession of a thing by a court



vests it with exclusive jurisdiction over the same for all purposes, needs no argument.

From this elementary common sense principle it follows that the bankruptcy court having possession of the *res*, inherently and independently of statute, acquired exclusive jurisdiction to determine all conflicting claims relating thereto and the sole right of disposition thereof.

The proposition has been announced by various courts with almost tiresome repetition and we could multiply the authorities indefinitely. This is unnecessary, however, as the Supreme Court of the United States has spoken upon the subject at least as late as January, 1909. It was there said:

“Where a court of competent jurisdiction has taken property into its possession, *through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property.* In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. vs. Adelbert College*, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where pro-

perty was in the possession of the bankrupt at the time of the appointment of a receiver it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had not right to deliver it to him without the order of the court. *Witney vs. Wenman*, 198 U. S. 539, 49 L. ed. 1157,, 25 Sup. Ct. Rep. 778. On the day the opinion in the *Bardes Case* was announced the same justice delivered the opinion of the court in *White vs. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, a case in which the facts were essentially those of the case at bar. Certain persons, co-partners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the district court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: ‘The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.’ *The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of*

*a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see Skilton vs. Codington, 185 N. Y. 80, 85, 86, 113 Am. St. Rep. 885, 77 N. E. 790, and Frank vs. Vollkommer, which, by implication approve the same principle.*

*Murphy vs. John Hofman Co., 211 U. S. 562-567 (53 L. ed. 327-330.)*

This leaves only the primary question i. e. the title of the trustee in the community property and the right of the court to order the sale in the first instance. A determination of this point depends upon whether or not the adjudication vested the trustee with title to the community property and with authority to devote the same to the payment of community debts. It must be remembered that we are not contending that community real estate can be devoted to the discharge of the separate obligations of either spouse.

It was admitted in argument and found as a fact by Judge Hoyt and Judge Neterer that a portion of the indebtedness was actually community. (See opinion of Judge Neterer R. p. 26.) On the other hand appellant's answer states that the Dexter Horton Trust and Savings Bank's claim is a separate debt, while the reply avers that it is a com-



munity obligation. No proof was offered and in its absence this court must accept the reply as true, as all debts contracted during coverture are *prima facie* community obligations. For this reason your Honors must approach this case as if all the claims were actually, in contradistinction to presumptively, proved community debts.

This presumption is always entertained and can only be overcome by clear, cogent and convincing testimony.

“But it is claimed that in the absence of any showing of this kind it will be presumed that it was the separate debt of the spouse against whom the judgment was rendered. In our opinion, every debt created by the husband during the existence of the marriage is *prima facie* a community debt. All the property acquired by him is *prima facie* community property, and we think that justice and good conscience demand that the other presumption should also prevail. In the absence of any proof as to the nature of the debt this presumption obtained, and, for the purpose of this case, the debt upon which this judgment was rendered must be held to have been a community debt, and for that reason the entire property of the community divested by the sale made thereupon; and, as this appellant is charged with full notice, it can assert no right which the community could not have asserted if it had not conveyed. It follows that it has no interest whatever in the property.”

*Calhoun vs. Leary*, 6 Wash. 21.

*Diamond vs. Turner*, 11 Wash. 189.

*Peacock vs. Ratliff*, 62 Wash. 653. (114 Pac. 507.)

*Bird vs. Steele*, 74 Wash. 68. (132 Pac. 724.)

In *Bird vs. Steele*, *supra*, it was said:

“ \* \* \* This court has held in a long line of cases, indeed, as is said in *Floding vs. Denholm*, 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business rendered the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. *Oregon Imp. Co. vs. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton vs. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee vs. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Philips & Co. vs. Langlow*, 55 Wash. 385, 104 Pac. 610. To an accommodation indorser: *Shuey vs. Holmes*, 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber to the stock of a corporation: *Shuey vs. Adair*, 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: *Allen vs. Chambers*, 18 Wash. 341, 51 Pac. 478; *Allen vs. Chambers*, 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: *McGregor vs. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. *Milne vs. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas.

A. 318, 36 L. R. A. (N. S.) 88; *Woste vs. Rugge*, 68 Wash. 90, 122 Pac. 988.”

*Bird vs. Steele*, 74 Wash. 71.

And this presumption extends to debts contracted without as well as within the state.

*La Selle vs. Woolery*, 11 Wash. 337.

All property acquired during coverture is likewise presumed community “until the contrary is shown by clear and convincing proof”.

*Yesler vs. Hochstettler*, 4 Wash. 349.

*Freeburger vs. Caldwell*, 5 Wash. 767.

*Curry vs. Catlin*, 9 Wash. 495.

*Denny vs. Schwabacher*, 54 Wash. 689.

Section 5918, *Remington & Ballinger's Code of Washington*, gives the husband—

“ \* \* \* the management and control of the community real property, \* \* \* but he shall not sell, convey or encumber community real estate, unless the wife joins \* \* \*.”

This section further provides—

“ \* \* \* that all such community real estate shall be subject \* \* \* to liens of judgments recovered for community debts, and to sale on execution issued thereon.”

That the debts of either spouse contracted dur-



ing coverture are presumptively community and that community property may be levied upon and sold under a judgment obtained against the husband is placed by the decisions quoted and numerous others beyond cavil.

*Curry vs. Catlin*, 9 Wash. 495. (37 Pac. 678.)

*Diamond vs. Turner*, 11 Wash. 189. (39 Pac. 379.)

And a conveyance to an assignee for the benefit of community creditors is not such a conveyance as comes within the statutory inhibition, but is merely a rightful application of the community property to the discharge of community obligations.

*Thygesen vs. Neufelder*, 9 Wash. 455.

Section 70 of the Bankruptcy Act automatically vests the trustee upon his appointment and qualification, by operation of law with title to:

“Subdivision (5) property which prior to the filing of the petition he could by any means have transferred or which might have *been levied upon and sold under judicial process against him.*”

The amendment of 1910 to section 47 of the Bankruptcy Act provides:

“ \* \* \* and such trustees, as to all property in the custody or coming into the custody

of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.”

The Supreme Court of Washington held in the *Thygesen* case that an assignment by a husband for the benefit of his creditors carried all community property to the assignee for the payment of community debts. The court recognized the statutory requirements that the wife must ordinarily join with the husband in the conveyance of community real property, but nevertheless held that the deed of assignment by the husband alone carried title to the assignee in trust for the payment of community debts.

The court after reaffirming and approving *Oregon Improvement Co. vs. Sagmeister*, 4 Wash. 710 (30 Pac. 1058), holding that a judgment against the husband alone was *prima facie* binding upon the community and one for which the community real property might be sold under execution, approached the question of the husband's right to convey. In this connection it was said at page 459:

“But it is contended on the part of the

respondent, that to give to the deed of the husband alone any force whatever, is in violation of our statute (Gen. Stat. Sec. 1400), which provides that no conveyance or incumbrance of the community real estate shall be valid unless the husband and wife join in the making thereof. If this deed comes within the inhibition of this statute, it is undoubtedly void. But in our opinion it does not. As above suggested, we think it is not a deed or an incumbrance of the property in the ordinary sense. On the contrary, it is but a surrender of the same into the custody of the court for the purpose of having it applied as the law requires it to be; and if there is any surplus remaining, it would be returned to the community. The paper executed by the husband should therefore be considered not as a conveyance but as one of the methods by which the property may be subjected to the community debts, and that it being in the power of the husband to contract such debts in the prosecution of the business of the community, it is within his power to set on foot the machinery of the law by which its property may be applied to their payment."

*Thygesen vs. Neufelder*, 9 Wash. 459.

Twenty years after the decision in the *Thygesen* case (whose authority has never been questioned) the same court held in *Bimrose vs. Matthews* (decided February 6, 1914), that a discharge of the husband in bankruptcy from the obligation of a community debt operated to also discharge the wife, although she was not a party to the bankruptcy pro-



ceeding. The court speaking to the question said at page 38:

“The appellant also argues that the discharge of W. H. Starkey by the United States District Court in bankruptcy did not discharge Alice B. Sharkey, his wife. The property sold by Starkey and wife was community property and the contract was a community contract. Under the statutes of the state, the husband has the management and control of such property, but he shall not sell, convey or encumber the same without his wife joining in the conveyance. *Rem. & Bal. Code*, Sec. 5918 (P. C. 95, Sec. 29). When the husband was discharged in bankruptcy from the obligation of the contract, it must of necessity follow that the wife was also discharged, because her separate property is not subject to the community debt. *Sweet, Dempster & Co. vs. Dillon*, 13 Wash. 521, 43 Pac. 637. Nor the separate debts of her husband. *Rem. & Bal. Code*, Sec. 5916 (P. C. 95, Sec. 9).”

*Bimrose vs. Matthews*, 78 Wash. 38.

This was a clear recognition of the Bankruptcy Court's right over community property, for how could the wife or the community be released unless the court has authority to devote the community property to the discharge of its debts? It certainly could not discharge the liability without first exhausting the assets.

Counsel base their principal argument upon certain cases which hold that a partnership cannot

be insolvent so long as any of its members are individually solvent. We have no quarrel with this doctrine.

Admitting some common attributes there is really but little analogy between the Washington community and an ordinary co-partnership. We all know that the one is a creature of statute whose *status* is fixed, and indeterminable except by death or divorce, while the other is born in contract and subject to termination at the will of the parties.

Without attempting to analyze the points of resemblance and difference, we need only call attention to the fact that it is an every day occurrence for one partner to acquire property and to incur obligation outside the scope of the partnership. On the other hand it is difficult to conceive of a situation wherein a married man could do either without affecting the community. The fruits of his every effort operate to its advantage and it must pay the penalty of any obligation which he incurs in the conduct of its business. His business is its business and the man, his wife, and the community they compose, are so perfectly blended that it is impossible from a business standpoint to distinguish them. Solvent partnerships may have one or more insolvent members but it would take a broad stretch of

the imagination to conceive of an insolvent husband at the head of a solvent community of thirty years standing.

The argument pursued by counsel in his endeavor to establish their identity only tends to emphasize and prove them inherently distinct. We shall therefore follow his argument no farther, but discuss what we believe to be the fundamental point of jurisdiction. We shall further ignore that portion of his argument which is based upon facts *dehors* the record.

It is probable that the framers of the Bankruptcy Act never heard of our community law, and highly improbable that they had it in mind when the act was drafted. It is incumbent upon the courts however to administer the Act in this jurisdiction, and to do so intelligently it must be adapted to the local situation.

All judgments rendered against either spouse during coverture are presumed to be community obligations, and community property may be sold on execution in satisfaction thereof without further ado. This presumption has been universally applied and has become a settled rule of property within the jurisdiction.

It is well settled that the allowance or disallow-



ance of a claim by a Bankruptcy Court is *res judicata* in a proceeding on the claim in another jurisdiction.

*Hangadine vs. Hudson*, 122 Fed. 238. (See C. A. 8 Circuit.)

*Elmore vs. Henderson*, 60 So. 820 (Ala.).

It was determined by the Supreme Court of Washington in *Bimrose vs. Matthews*, 78 Wash. 38 *supra*, that the discharge of the husband in bankruptcy also discharged the wife from community obligations.

It follows that the proof of a claim in bankruptcy is tantamount to the recovery of a judgment and necessarily carries all the presumptions which attach to an ordinary judgment in the state courts. It would certainly be a peculiar and anomalous situation to have one set of presumptions pertaining to the Federal and another in the State courts—especially in view of the *Bimrose* case and *Thygesen vs. Neufelder*, 9 Wash. 455, *supra*—the latter holding that all the presumptions pointed out, attached to insolvency proceedings in the State court and that all community property passes to the assignee. It would certainly be a most inequitable doctrine that would sustain a discharge of a wife

from community obligations and not require the application of community assets to the payment of claims of honest creditors.

In the court below counsel laid considerable stress upon *Porter vs. Lazear*, 109 U. S. 84. The effect of that decision and counsel's argument thereupon is well answered by what Judge Neterer said in the closing paragraph of his opinion:

“*Porter vs. Lazear*, 109 U. S. 84, cited by counsel for the wife, I think, is readily distinguished, in this, that by the provisions of the Act which creates the community estate, it is provided that the community real property shall be subjected to the payment of community debts and to sale on execution issued upon judgments obtained. The community right of the wife being a creature of the statute, is by the same statute, subjected to the community obligations; and while the Supreme Court of Pennsylvania held that the dower right of the wife could be sold under execution, there is no provision of the statute of Pennsylvania subjecting the dower interest of the wife to any indebtedness; nor is there a provision in the Bankruptcy laws of 1867, 14 Stat. at Large, page 517, under which that decision was rendered, vesting the trustee with the rights, remedies and powers of a judgment creditor holding an unsatisfied execution, and rights as contained in the provision of the act of June, 1910, *supra*.”

For the foregoing reasons we respectfully sub-

mit that the judgment of the District Court should be affirmed.

Respectfully submitted,

CLISE & POE,

*Solicitors for*

Dexter Horton Trust and Savings Bank.

405 New York Building,  
Seattle, Washington.



No. 2481

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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

MARY L. GIBBONS,

Petitioner,

vs.

J. S. GOLDSMITH, as Trustee in  
Bankruptcy of the Estate of PAT  
GIBBONS, Bankrupt,

Respondent.

No. 2481

In the Matter of PAT GIBBONS,  
Bankrupt.

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BRIEF OF J. S. GOLDSMITH, TRUSTEE.

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McCLURE & McCLURE,  
Solicitors for Trustee.

1509 Hoge Building,  
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This proceeding should be dismissed, the proper proceeding being by appeal. We move that order be entered accordingly.

*Hirlinger v. Boyd*, 217 Fed. 546.

McCLURE & McCLURE,  
Solicitors for Trustee.

## ON THE MERITS.

The controlling question is, can a judgment against the husband alone, on a community debt, be enforced *prima facie* against the community property?

We think this question is no longer open to debate in the State of Washington.

In this case the marital community has existed for more than thirty years (Transcript of Record, page 17).

Debts contracted during that time are *prima facie* community debts.

*Oregon Imp Co. v. Sagemeister*, 4 Wash. 710, 30 Pac. 1058.

*Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070.

*Bryant v. Stetson etc. Co.*, 13 Wash. 692, 43 Pac. 931.

*McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034.

*Abbott v. Weatherby*, 6 Wash. 507, 33 Pac. 1070.

*Bell v. Waudby*, 4 Wash. 743, 31 Pac. 18.

*Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379.

*Lumberman's Nat. Bank v. Gross*, 37 Wash. 18, 79 Pac. 470.

*Young v. Porter*, 27 Wash. 551, 68 Pac. 362.

*Anderson v. Harper*, 30 Wash. 378, 70 Pac. 965.



*Reed v. Loney*, 22 Wash. 433, 61 Pac. 41.

*Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402.

*Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678,  
39 Pac. 101.

*Peacock v. Ratliff*, 62 Wash. 653, 114 Pac.  
507.

*Stewart v. Kleinschmidt*, 51 Wash. 90, 97 Pac.  
1105.

*Bird v. Steele*, 74 Wash. 68, 132 Pac. 724.

*Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988.

*Strom v. Toklas*, 78 Wash. 223, 138 Pac. 880.

*Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

*Ballinger Community Property*, Sec 119.

*McKay, Community Property*, Sec. 335.

*Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736.

*Baker v. Murrey*, 78 Wash. 241, 138 Pac. 890.

*Way v. Lyric Theatre Co.*, 79 Wash. 275, 140  
Pac. 320.

*Philips v. Langlow*, 55 Wash. 385, 104 Pac.  
610.

*Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536.

Property acquired during the existence of the community is prima facie community property.

*Lemon v. Waterman*, 2 W. T. 485, 7 Pac. 899.

*Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac.  
398.

*Mabie v. Whittaker*, 10 Wash. 656, 39 Pac.  
172.

*Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229.

*Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732.

*Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732.

*Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125.

*Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070.

*Hill v. Young*, 7 Wash. 33, 34 Pac. 144.

*Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

*Mattson v. Mattson*, 29 Wash. 417, 69 Pac. 1087.

*Woodland Lumber Co. v. Link*, 16 Wash. 72, 47 Pac. 222.

*Re Murphy's Estate*, 46 Wash. 574, 90 Pac. 916.

*Denny v. Schwabacher*, 54 Wash. 689, 104 Pac. 137.

*Fisher v. Marsh*, 69 Wash. 570, 125 Pac. 951.

*Patterson v. Bowes*, 78 Wash. 476, 139 Pac. 225.

*Williams v. Beebe*, 79 Wash. 133, 139 Pac. 867.

*Ballinger, Community Property*, Sec. 19.

*McKay, Community Property*, Sec. 255.

*Graves v. Graves*, 48 Wash. 664, 94 Pac. 481.

Such property is subject to the lien of judgments recovered on community debts, and to sale on execution issued thereon.

2 Remington & Ballinger's Ann. Codes of Wash., Sec. 5918.

*Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678.

*Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435.

*Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738.

*Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478, 22 Wash. 304, 60 Pac. 1128.

*Thygeson v. Neufelder*, 9 Wash. 455, 37 Pac. 672.

On principle the foregoing propositions should be sustained, the discharge in bankruptcy of the husband from the obligation of a community debt, discharging also the wife.

*Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319.

And the wife's separate property is not subject to community debts.

*Sweet Dempster & Co. v. Dillon*, 13 Wash. 521, 43 Pac. 637.

The trustee, as to all property in the custody, or coming into the custody, of the bankruptcy court, is vested by operation of law with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, and, as to all property not in the custody of the bankruptcy court, is vested with all the rights, remedies and powers



of a judgment creditor holding an execution duly returned unsatisfied.

Bankruptcy Act 1898, Sec. 47-a (Amend. 1910).

The trustee hereby adopts and makes a part of this brief the brief of the Dexter Horton Trust & Savings Bank, separately filed herein.

The order of the court below should be sustained.

Respectfully submitted,

McCLURE & McCLURE,  
Solicitors for J. S. Goldsmith, Trustee.

No. 2482

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHAN KAM,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

In the Matter of the Application of CHAN  
KAM, alias CHAM KAM, for a Writ of  
Habeas Corpus.

## REPLY BRIEF FOR APPELLEE

JOHN W. PRESTON,  
United States Attorney,

CASPER A. ORNBAUN,  
Asst. United States Attorney,  
*Attorneys for Appellee.*

Filed this.....day of February, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





No. 2482

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHAN KAM,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

In the Matter of the Application of CHAN KAM, alias CHAM KAM, for a Writ of Habeas Corpus.

## REPLY BRIEF FOR APPELLEE

### Facts

Since counsel for appellant has made an incomplete statement of the facts in this case, appellee desires to supplement said statement by calling attention to further facts constituting a part of the record in this case, and set forth in appellant's Petition for a Writ of Habeas Corpus, as follows:

On the 12th day of August, 1913, a warrant was issued by the United States Department of Labor, for the arrest of appellant, Chan Kam, alias Cham Kam, for being "in the United States in violation of the act of Congress approved February 20, 1907, amended by the act of Congress approved March 27,

1910," in that it appeared "that the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution, subsequent to her entry into the United States."

An arrest was made of said alien on the 26th day of August, 1913, at Dinuba, California, and a first hearing held at the county jail at Fresno, Fresno County, California, on the 27th day of August, 1913, before Chinese and Immigrant Inspector W. A. Brazie.

The record shows that at the time of the first hearing said alien was allowed to inspect the warrant of arrest and all of the evidence upon which said warrant was based, and advised of her right to be represented by counsel; that said alien availed herself of her right to counsel and had one E. A. Williams, an attorney, present at all subsequent hearings.

On the 28th day of August, 1913, the record, as disclosed in appellant's petition for a writ of habeas corpus, shows that Examining Inspector W. A. Brazie gave said alien and her counsel ample opportunity to inspect and meet any and all evidence in the hands of the Government's Agents, and in this connection appellee quotes a statement from Examining Inspector W. A. Brazie as follows:

"Mr. Williams: The complete record in this case, so far as it has proceeded, is handed you for inspection; and you are entitled to submit any evidence in rebuttal to that presented by

the Government. Are you ready to proceed with the hearing of the case?"

to which Attorney Williams replied:

"I desire to look into the matter and have witnesses for the alien. I will ask that this case be continued until Monday, the 1st day of September, 1913, at which time I will have our witnesses present."

The hearing was continued as requested by the alien's counsel and said counsel was present at all other hearings and given ample opportunity to examine and overcome by rebuttal testimony or otherwise all of the evidence submitted and relied upon by the Government.

### **The Evidence Submitted**

The testimony upon which the Government relies and which constitutes a part of the record in this case, the same being fully set forth in the appellant's Petition for a Writ of Habeas Corpus, is as follows:

Appellant, Chan Kam, alias Cham Kam, being first duly sworn, testified through an interpreter as follows:

"My name is Chan Kam; I am 22 years of age; subject of China; of the Chinese race; embarked for the United States from Hong Kong, China, and landed at the Port of San Francisco, California, x. S. T. 1-3-19 (January 23, 1909); my destination at that time was San Francisco, California. The names and addresses of my family in the United States and abroad are as follows:

My husband, Ho Bat, living at Dinuba, California; and I have no other relatives either in the United States or in China.



Q. Where were you born?

A. In Hong Kong, China.

Q. Have you ever been back to China since you came to the United States?

A. Never been back.

Q. Who did you come to meet when you came to the United States?

A. My first husband, Low You. He afterwards went back to China and died; then I married Ho Bat.

Q. What have you been doing since you married Ho Bat?

A. Housewife.

Q. Were you practicing prostitution in Dinuba, California, about one month since?

A. No.

Q. You were arrested on that charge by the city marshal and constable were you not?

A. Yes.

Q. Were you guilty of that charge?

A. No.

Q. When you were arrested at that time you were found in bed with a Chinaman who was not your husband?

A. No; I was standing beside the bed, and the man was in the bed.

Q. Whose bed was this

A. Mine.

Q. Whose house was it?

A. Mine.

Q. Where was your husband when this happened?

A. I don't know; out on the street, I suppose.

Q. What was this Chinaman doing in your bed?

A. Waiting for my husband.

Q. What time was it when you and this man were discovered by the officers in your room, and he in your bed?

A. Little after 9 o'clock at night.

Q. Was this Chinaman the only man who ever occupied that bed with you?

A. No; my husband occupied it with me also.

Q. What was the reputation of the house where you lived in Dinuba?

A. I don't know what its reputation was.

Q. Was it known as a house of prostitution?

A. I don't know.

Q. Was it a house of prostitution?

A. I don't know.

Q. What did you use the house for?

A. To live in.

Q. Did you practice prostitution in the house or any other place in Dinuba

A. No.

Q. What was the name of the man who was arrested with you in that room at Dinuba?

A. Jew Lin; he was a friend of my husband.

Q. Were you in the habit of allowing friends of your husband to occupy your bed in your bedroom?

A. Yes, when they wanted to.

Q. What did you use the napkins, towels, wash basin, vaseline and other paraphernalia of a prostitute for?

A. I used the napkins to wipe my hands, and the towels for the monthly periods, and the basin to wash my feet.

Q. What was the vaseline for?

A. Clean my hands.

Q. All of these articles with the exception of the wash basin were found in your bed. There were several hundred of the paper napkins.

A. I had a right to place my property in my bed.

Q. Do you know R. L. Hill, city marshal of Dinuba?

A. No.

Q. I will read you what he says about your practicing prostitution and the reputation of your house. Is he telling the truth?

A. I was not practicing prostitution there, and I don't know what was the reputation of the house.

Q. Are you acquainted with J. H. Farrar, constable at Dinuba?

A. No.

Q. I will read you what he says about your case. Is he telling the truth?

A. I don't know, but I was not practicing prostitution.

Q. The two men whose statements were just read you were the men who arrested you and Jew Lin, at Dinuba. Do you know them?

A. No.

Q. Both officers swore to the statements, and they say you were in bed with Jew Lin when you were arrested.

A. That is not true; I was standing by the side of the bed.

Q. Had you been in the bed with this man before the officers came into the room?

A. No.



Q. What were you doing in the room, with the door closed, at that time of the night and a strange man in your bed, with your husband absent?

A. It was my room and bed, and Jew Lin was in bed waiting for my husband.

Q. Did you ever give your husband, Ho Bat, any money that you made by prostitution?

A. No; I never practiced prostitution.

Q. Who did that little bank which was in your suitcase belong to

A. That belonged to Ho Bat, my husband.

Q. Did you give him any of the money that was in that bank?

A. No. He gave me money.

Q. Who did the cooking at the house where you were living?

A. A Chinaman did it.

Q. What did you do about the house?

A. Nothing; just living there.

Q. Have you told the truth all the way through this examination?

A. Yes.

Q. Have you anything else to say?

A. No."

In the cross-examination of Ho Bat, the alleged husband, by Inspector Brazie, questions were asked and answers given as follows:

Q. Were you at this house all the time it was occupied by Chan Kam?

A. Yes.

Q. Continuously?

A. Sometimes I would be away for a short time.

Q. Were you there when Jew Lin was found in bed with Chan Kam?

A. That time I go out.

Q. Then you were not in the house all of the time she was there?

A. Most of the time I stay at home; sometimes I go out on the street.

Q. Then if you were not present all of the time you don't know whether other Chinese, Japanese and Americans visited Chan Kam at that house or not?

A. I believe nobody got into the room.

Q. But you don't know they did not?

A. No.

Q. What is the character of that house?

A. In the basement there is a hop joint entering into it by the sidewalk. There is no gambling joint there.

Q. When the officers got the opium outfits, etc., on the day Chan Kam was arrested they did not enter the opium joint by the sidewalk?

A. The regular way is to go by the sidewalk. The back way is by the kitchen.

Q. The room next to your room, and through which you claim it is necessary to go is a gambling joint?

A. No.

Q. What are all those tables and Chinese gambling paraphernalia doing in that room?

A. I don't know what they used them for.

Q. What were you doing at Dinuba with this woman?

A. I try to get into the fruit business.

Q. You are the same Ho Bat who took Chan Kam to Woodland, California, in May, 1912?

A. Yes, sir.

Q. You were not married to her then?

A. Not yet.

Q. She was arrested at that time on a charge of practicing prostitution?

A. Yes.

Q. You took her around the country a good deal before you married her did you not?

A. Not much.

Q. You are a Chinaman?

A. Yes, sir."

Jew Lin, who was found in appellant's room at the time of her arrest, testifying in her behalf, stated that said appellant was not near the bed during any of the time he was in her room. This statement is in direct contradiction of appellant's testimony for she said, "I was standing *by the side* of the bed."

The errors assigned by appellant are to the effect that said appellant was given an unfair hearing and that no evidence was submitted sufficient to support the charges of prostitution.

### Argument

The Government agrees with the appellant's counsel in his statement of the principle of law that,

"When by abuse of the discretion, or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the Courts of the United States to issue a Writ of Habeas Corpus and relieve him."



The cases cited by counsel in support of this principle are well known in Immigration law, and are relied upon by the Bureau of Immigration as supporting the law under which the Bureau operates. In the *Japanese Immigrant case* 189 U. S. 86, for instance, Justice Harlan said:

“Now it has been well settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien’s right to enter this country, or remain in it, depended, was due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.”

“Due process of law” referred to in appellant’s first specification of errors, does not require a judicial trial. That the decision may be intrusted to an executive officer, and that his decision was due process of law, was affirmed in.

*Nishimura Ekin vs. U. S.*, 142 U. S. 651;

*Fong Yue Ting vs. U. S.*, 149 U. S. 698;

*U. S. vs. Ju Toy*, 198 U. S. 253;

*Zakonaite vs. Wolf*, 226 U. S. 272.

And when a statute gives a discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is the sole and exclusive judge of the existence of those facts.

*Nishimura Ekin, supra*;

*U. S. vs. Ju Toy*, 198 U. S. 253;

See *Lung vs. Patterson*, 186 U. S. 170.

And the findings of said officer are final and conclusive.

*Healy vs. Backus*, 221 Fed. 358, 364;

*Tang Tun vs. Edsell*, 223 U. S. 673;

*Low Wah Suey vs. Backus*, 225 U. S. 460;

*Chin Yow vs. U. S.*, 208 U. S. 8.

So long as there are facts to support the findings of the officer Courts will not entertain jurisdiction.

*White vs. Gregory*, 213 Fed. 768;

*U. S. vs. Williams*, 200 Fed. 538.

And a Court will not inquire into the sufficiency of the probative facts, or consider the reasons for the conclusions reached by the officers.

*Healy vs. Backus*, *supra*;

*White vs. Gregory*, *supra*;

*Lee Lung vs. Patterson*, 186 U. S. 170.

In *Lee Lung vs. Patterson*, *supra*, it was said by the Court:

“But the jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and *we cannot assent to the proposition that an officer or tribunal invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence or by rejecting proper evidence, or by admitting that which is improper.*”

This brings us to a consideration of the question of whether or not the Government was unfair in the hearings conducted in this case. The record

shows that appellant was allowed to inspect the warrant of arrest and all of the evidence upon which it was issued and advised of her right to be represented by counsel; that appellant had one E. A. Williams, an attorney, represent her, and that he was given the complete record in the case, so far as it had proceeded, and advised by the Examining Inspector of the alien's right to submit any evidence she desired to rebut the evidence offered by the Government. The hearings in this case were manifestly fair, and this brings the Government to a consideration of the last error assigned by appellant, viz:

That there was no evidence tending to support the charge that appellant was a prostitute.

In answer to this the Government directs attention to that portion of appellant's testimony where the following questions were asked and answers given:

“Q. When you were arrested at that time you were found in bed with a Chinaman who was not your husband?

A. No, I was standing beside the bed, and the man was in the bed.

Q. Whose bed was this?

A. Mine.

Q. Whose house was it?

A. Mine.

Q. Where was your husband when this happened?

A. I don't know; out on the street, I suppose.



Q. What was this Chinaman doing in your bed?

A. Waiting for my husband.

Q. What time was it when you and this man were discovered by the officers in your room, and in your bed?

A. Little after 9 o'clock at night.

Q. Was this Chinaman the only man who ever occupied that bed with you?

A. No. My husband occupied it with me also.

\* \* \* \* \*

Q. What did you use the napkins, towels, wash basin, vaseline and other pharaphernalia of a prostitute for?

A. I used the napkins to wipe my hands, and the towels for my monthly periods, and the basin to wash my feet.

Q. What was the vaseline for?

A. Clean my hands.

Q. All of these articles with the exception of the wash basin were found in your bed. There were several hundred of the paper napkins?

A. I had a right to place my property in my bed.

\* \* \* \* \*

Q. What were you doing in the room, with the door closed, at that time of the night and a strange man in your bed, with your husband absent

A. It was my room and bed, and Jew Lin was in bed waiting for my husband."

One of the significant facts to which attention is directed is that the appellant stated positively and repeatedly that *Jew Lin* was in her bed when she was first examined by Inspector Brazie, and before

she had employed counsel, but as soon as counsel was employed, appellant stated that Jew Lin was sitting on her bed.

Since appellant was given the benefit of an interpreter, and every opportunity given her to state the truth, it would be folly for her to try to avoid her previous statements. The various forms in which the questions were asked and the very positive way in which they were answered by appellant shows that she understood both questions and answers. And it will be noted that counsel in his well prepared brief makes no comment on appellant's inconsistent testimony and does not even refer to the paraphernalia found in her bed at the time of the arrest.

It will be recalled that Ho Bat, the alleged husband, stated that appellant is the same woman whom he took to Woodland, California, in May 1912, before they were married, and that she, the appellant, was arrested at that time on a charge of practicing prostitution.

Under the circumstances of this case and in the face of the testimony herein set forth, can it be said that there was unfairness on the part of our Government, or that there was no evidence to support the charge that appellant was a prostitute?

Counsel for appellant refers to two affidavits of certain officers, and endeavors to impress upon the Court that the Government considered certain letters in arriving at its decision to deport said applicant. Counsel further states that, "During the hearing,

counsel for appellant requested the inspector to call them (referring to the officers) in order that the counsel for appellant might examine them.”

The Government submits that there is nothing in the record of this case to show that the decision of the Immigration officials was based upon affidavits or letters of officers; or that any demand was made upon said Immigration officials to call said officers in order that appellant’s counsel might examine them. Had such a demand been made the record, or the affidavits submitted in behalf of appellant, should show such a demand or request. Appellant’s position is not sound and unsupported by the law.

*Low Wah Suey vs. Backus*, 225 U. S. 460.

In this case the Government contends that appellant had every opportunity to fairly present her defense against deportation, and further, that there is not only *some* evidence (which is all the law requires in deportation proceedings) but that there is ample and conclusive evidence that said appellant was engaged in prostitution in the United States.

It is therefore earnestly requested that the decision of the lower Court be sustained.

Dated San Francisco, Cal., February 6, 1916.

Respectfully submitted,

JOHN W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Assist. United States Attorney,

*Attorneys for Appellee.*





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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GEORGE W. ALBRECHT,  
Plaintiff in Error,  
vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as RILEY and MARSTON,  
Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Fourth Division.

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Filed

JAN 28 1915

F. D. Monckton,  
Clerk.

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No. 2483

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GEORGE W. ALBRECHT,  
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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Fourth Division.

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INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer .....	6
Assignment of Errors.....	116
Attorneys of Record, Names and Addresses of..	1
Bond on Writ of Error.....	121
Certificate of Clerk U. S. District Court to Trans- script of Record.....	127
Citation on Writ of Error (Original).....	125
Complaint .....	3
Defense .....	76
Demurrer to First Affirmative Answer.....	9

EXHIBITS:

Plaintiff's Exhibit "A"—Bill of Sale—W. R. Day et al. to Raymond Blais, Ron- nald Blais and ————.....	17
Plaintiff's Exhibit "B"—Mining Deed, Chas. Purdy to W. R. Day.....	19
Plaintiff's Exhibit "C"—Quitclaim Deed, July 31, 1911, Raymond Blais et al. to W. R. Day.....	20
Plaintiff's Exhibit "D"—Quitclaim Deed, September 15, 1911, W. R. Day to George W. Albrecht.....	23



Index.	Page
Judgment.....	26
Motion for Default and Judgment.....	13
Motion for Directed Verdict in Favor of Defendants, etc.....	103
Motion for Order of Default and Judgment, and Affidavit of George W. Albrecht in Support Thereof .....	11
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error and Fixing Amount of Bond.....	115
Order Approving, etc., Bill of Exceptions.....	111
Order Denying Motion for Default.....	14
Order Overruling Demurrer and Permitting Amended Answer to be Filed.....	10
Petition for Writ of Error.....	114
Praecipe for Transcript of Record.....	1
Reply .....	16
Stipulation Re Transcript of Record.....	112
Testimony .....	27
TESTIMONY ON BEHALF OF PLAINTIFF:	
ALBRECHT, GEO. W.....	28
(Recalled) .....	35
(Recalled) .....	53
DAY, W. R. (Recalled).....	48
(Recalled) .....	51
(Recalled—Cross-examination by Mr. Roden) .....	52
Recalled.....	69
Cross-examination by Mr. Roden.....	69
Redirect Examination by Mr. Taylor..	75

## Index.

## Page

## TESTIMONY ON BEHALF OF PLAINTIFF—Continued:

FOX, J. F.....	33
Recalled.....	36
Recalled.....	75
KEHOE, F. L.....	50
MANN, ROBERT.....	55
Cross-examination by Mr. Roden.....	61
Redirect Examination by Mr. Taylor..	65
MUTCHLER, DAVID.....	66
Cross-examination by Mr. Roden.....	68
PURDY, C.....	29
Cross-examination by Mr. Roden.....	32
Redirect Examination by Mr. Taylor..	33
Recalled.....	46
Cross-examination by Mr. Roden.....	47
TAYLOR, CHARLES E.....	52

## TESTIMONY ON BEHALF OF DEFENDANTS:

BRISTOL, W. M.....	76
MANN, ROBERT (Recalled).....	96
Cross-examination by Mr. Taylor.....	99
McCARTY, M. D.....	94
Cross-examination by Mr. Taylor.....	96
McDONALD, D. S.....	87
Cross-examination by Mr. Taylor.....	89
McEWAN, THOMAS.....	90
Cross-examination by Mr. Taylor.....	93
RILEY, J. E., in His Own Behalf.....	100
Cross-examination by Mr. Taylor.....	102

Index.	Page
TESTIMONY ON BEHALF OF DEFEND-	
ANT—Continued:	
STRANDBERG, CHARLES.....	81
Cross-examination by Mr. Taylor.....	84
Redirect Examination by Mr. Roden..	87
Verdict.....	25
Verdict.....	26
Writ of Error (Original).....	123



**[Names and Addresses of Attorneys of Record.]**

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEO. W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as Riley and Marston,  
Defendants.

CHAS. E. TAYLOR, Attorney for Plaintiff,  
Iditarod, Alaska.

HENRY RODEN, Attorney for Defendants,  
Iditarod, Alaska. [1\*]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEO. W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as Riley and Marston,  
Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare the transcript of the record of this case to be filed in the office of the Clerk

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\*Page-number appearing at foot of page of original certified Record.

of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore perfected to said Court, and include in said transcript the papers included within the stipulation entered into by the plaintiff and the defendants by and through their respective attorneys in this case, namely: Complaint, Answer, Demurrer to Answer, Order overruling Demurrer and permitting Amended Answer, Affidavit of Geo. W. Albrecht, Motion for Default, Order denying motion for Default, Reply, Plaintiff's Exhibit "A," "B," "C," "D," Verdict, Judgment, Testimony, Petition for Writ of Error, Stipulation; together with all papers filed subsequent to said stipulation.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, before the first day of November, nineteen hundred and fourteen.

CHAS. E. TAYLOR,

Attorney for Plaintiff in Error.

Filed in the District Court, Territory of Alaska,  
4th Div. Jul. 28, 1914.

ANGUS McBRIDE,

Clerk.

By Geo. W. Albrecht,

Deputy. [2]

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEO. W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as Riley and Marston,  
Defendants.

**Complaint.**

COMES now the plaintiff, George W. Albrecht, and for cause of action against the above-named defendants, complains and alleges:

I.

That at all of the times mentioned herein the plaintiff was and is now the owner of that certain placer mining claim known and described as the Elliott Association Placer mining claim situated on Boulder Creek in the Otter Mining Precinct, Fourth Division, Territory of Alaska.

II.

That between the first day of October, 1911, and the 31st day of January, 1912, the said defendants, with their agents, servants and employees, and with full knowledge and notice of plaintiff's rights in and to the mining claim aforesaid, did forcibly enter upon said claim and did cut down growing and standing trees thereon and cut the same into cordwood, sufficient in quantity to make seven hundred (700)



cords of wood, and did carry away from said mining claim the said seven hundred cords of wood and did convert the same to their own use and benefit, all of the said acts of said defendants being contrary to and against the wishes and desire of plaintiff and without his consent. [3]

### III.

That prior to the time of the committing of the said acts by said defendants, notices to trespassers were posted on the said claim, forbidding all persons to trespass on said mining claim; that at various times during the continuance of said trespass by said defendants and their employees, they were notified and warned against such trespass, but that defendants and their agents and employees disregarded such notices and warnings, and continued their acts of trespass as above set forth.

### IV.

That the value of said timber and wood to plaintiff and the reasonable value thereof was, and is, three dollars (\$3.00) per cord; that by reason of the acts of said defendants as above set forth, plaintiff lost said timber and trees sufficient to make 700 cords of wood, and the said placer mining claim belonging to plaintiff was greatly damaged, and lessened in value of the amount of \$2100.00, that being the value of said wood as aforesaid.

### V.

That by reason of the acts of the said defendants as above complained of, and under and by virtue of the laws of Alaska as set forth in Sections 322 and 323 of Chapter 33, Part IV of Carter's Annotated

Codes of Alaska, the said defendants became liable to plaintiff in treble the amount of said damage; that defendants have not paid the same nor any part thereof, and there is now due and owing from defendants to plaintiffs the sum of Sixty-three Hundred Dollars (\$6300.00).

WHEREFORE plaintiff prays judgment against the said defendants for the sum of Sixty-three Hundred Dollars (\$6300.00), together with the costs and disbursements of this action.

CHAS. E. TAYLOR,  
Attorney for Plaintiff. [4]

United States of America,  
Territory of Alaska,  
Otter Precinct,—ss.

Charles E. Taylor, being first duly sworn on oath, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes. That the plaintiff therein named is absent from the Territory of Alaska, and Otter Precinct aforesaid, and cannot make this verification himself, and for that reason this affiant makes this verification for and on behalf of said plaintiff.

CHAS. E. TAYLOR.

Subscribed and sworn to before me this 6th day of May, 1912.

[Seal] E. M. STANTON,  
Notary Public in and for Alaska. Commissioner  
and Ex-officio.

Filed in the District Court, Territory of Alaska,  
4th Div. May 15, 1912. C. C. Page, Clerk. By  
E. M. Stanton, Deputy. [5]

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*In the District Court for the Fourth Division,  
Territory of Alaska.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY, and M. H. MARSTON, Copartners  
Doing Business as RILEY and MARSTON,

**Answer.**

COMES now the defendants by Henry Roden,  
their attorney, and answering the complaint of the  
plaintiff herein deny and allege as follows:

1.

Answering paragraph one of said complaint the  
defendants deny each and every the allegations  
therein set forth and the whole thereof.

2.

Answering paragraph two of said complaint the  
defendants deny each and every the allegations  
therein set forth, and especially deny that they,  
their agents, servants or employees, did cut and re-  
move from the placer mining claim described in said  
complaint 700 cords of wood or any other quantity of  
wood whatsoever or at all.

3.

Answering paragraph three of said complaint the



defendants deny each and every the allegations therein set forth and the whole thereof.

4.

Answering paragraph four of said complaint the defendants deny each and every the allegations therein set forth and especially deny that the said placer mining claim has been damaged in the sum of \$2100.00, or in any other sum whatsoever or at all.

[6]

5.

Answering paragraph five of said complaint defendants deny the allegation set forth therein and the whole thereof and especially deny that there is due and owing to the plaintiff from the defendants the sum of \$6300.00 or any other sum whatsoever or at all.

As a further and affirmative defense the defendants allege.

1.

That in the month of February 1910, plaintiff's predecessors in interest, to wit: J. Elliott, J. E. Miller, J. Day, Fred Church, J. F. Fox, C. Purdy, Wm. Gray and J. Raap entered upon the premises described in the plaintiff's complaint as the "Elliott Association" placer mining claim, which was then and is now unappropriated public domain, and made a pretended mining location thereon.

2.

That the said premises at the time of making the said pretended mining location was chiefly valuable for the timber standing and growing thereon.

## 3.

That the area embraced within the said premises and pretended mining location never was, and is not now valuable for the minerals contained therein, but its sole value consists of the trees and timber standing thereon.

## 4

That the said pretended mining location was not made in good faith because of the minerals therein contained, but on the contrary the said locators, J. Elliott, J. E. Miller, J. Day, Fred Church, J. F. Fox, C. Purdy, Wm. Gray, J. Raap did mark the boundaries thereof for the sole purpose of securing the timber situate thereon and not for placer mining purposes, that no discovery of gold as required by law has ever been made within the boundaries of said pretended mining location by either plaintiff's grantor or by any person for them or on their behalf.

[7]

As a further and second affirmative defense defendants allege.

## 1.

That the plaintiff is not the sole owner of the Elliott Association, but that one J. Elliott has an interest in the said Elliott Association and should be made a party plaintiff in this action.

WHEREFORE defendants pray that the plaintiff take nothing by his complaint and that they go hence with their costs and disbursements herein.

HENRY RODEN,  
Attorney for Defendants.

Territory of Alaska,  
Otter Precinct,—ss.

J. E. Riley, first being duly sworn, on oath deposes and says: That he is one of the defendants in the above-entitled action, that he has read the foregoing answer knows the contents thereof, and that the same is true as he verily believes.

J. E. RILEY.

Sworn and subscribed to before me this July 10, 1912.

[Seal]

HENRY RODEN,  
Notary Public.

Filed in the District Court, Territory of Alaska,  
4th Div. Jul. 16, 1912. C. C. Page, Clerk. [8]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

RILEY & MARSTON, Copartners,

Defendants.

**Demurrer to First Affirmative Answer.**

COMES now the above-named plaintiff by his attorney, Chas. E. Taylor, and demurs to the first further affirmative defense contained in the answer of the above-named defendants on file herein, for the reason that the same does not state facts sufficient



to constitute a defense to plaintiff's complaint.

Plaintiff further demurs to the second further and affirmative defense contained in said answer, for the reason that the same does not constitute a defense to plaintiff's complaint.

CHAS. E. TAYLOR,  
Attorney for Plaintiff.

Received copy of above this 16th day of July 1912.

HENRY RODEN.  
Attorney for Defendant.

Filed in the District Court, Territory of Alaska,  
4th Div. Jul. 17, 1912. C. C. Page, Clerk. [9]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,  
Plaintiff,  
vs.

J. E. RILEY and M. H. MARSTON,  
Defendants.

**Order Overruling Demurrer and Permitting  
Amended Answer to Be Filed.**

This matter having heretofore come on for hearing on the demurrer to the defendants' answer, and after argument thereof the court having taken the same under advisement, now, after due consideration,

IT IS ORDERED that said demurrer be, and the same is hereby, overruled, and the defendants, upon application, are given permission to file an amended answer forthwith.

Done in open court this 12th day of September, 1912.

F. E. FULLER,  
District Judge.

Entered in Court Journal No. 1, page 379, Iditarod, Alaska.

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 12, 1912. C. C. Page, Clerk. [10]

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**[Motion for Order of Default and Judgment, and  
Affidavit of George W. Albrecht in Support  
Thereof.]**

*In the District Court, for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as RILEY & MARSTON,  
Defendants.

United States of America,  
Fourth Division,  
Otter Precinct,—ss.

George W. Albrecht, being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action; that he is an attorney at law, duly admitted and licensed to practice in all of the courts of the said Territory of Alaska; that the attorney of

record in the above-entitled action, Chas. E. Taylor, is now without the said Territory of Alaska, and that there is no attorney within reach, nor within one hundred miles of this affiant.

That personal service of the summons in the above-entitled action was had upon the defendant J. E. Riley, upon the 22d day of May, 1912; that upon the 24th day of June, 1912, an affidavit and motion for default were made and filed herein against the said defendants; that upon said 24th day of June, and after the filing of said affidavit and motion for default, Henry Roden entered his appearance as attorney for the defendant J. E. Riley.

That said default was set aside and defendants allowed to file their answer, which was done on the 16th day of July, 1912, said answer being the joint answer of both of said defendants;

That to this answer the plaintiff demurred, said demurrer being by the court overruled; whereupon, and on the 12th day of September, 1912, in open court and upon the application of the said defendants, they were given permission to file an amended answer [11] forthwith; that no amended answer has in this case been filed, nor have any steps been taken for an enlargement of the time in which to file said amended answer; there is no motion nor pleading, nor other proceeding now pending herein, but the action is without any steps whatever since the said 12th day of September, 1912.

That the time within which said amended answer could have been filed is long since past.

GEO. W. ALBRECHT.



Subscribed and sworn to before me this the Fourteenth day of January, A. D. 1913.

[Seal]

CYRIL P. WOOD,

Notary Public in and for the Territory of Alaska,  
Residing at Iditarod.

Comes now the plaintiff, George W. Albrecht, in his own proper person, and by reason of the premises set forth in the foregoing affidavit, makes application to this Honorable Court, and moves for an order of default and judgment thereupon, against the said defendants J. E. Riley and M. H. Marston, and each of them, and in favor of the plaintiff herein, for the relief demanded in the complaint.

GEO. W. ALBRECHT.

Filed in the District Court, Territory of Alaska,  
4th Div. Jan. 14, 1913. C. C. Page, Clerk. Geo.  
W. Albrecht, Deputy. [12]

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*In the District Court, Territory of Alaska, Fourth  
Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as RILEY & MARSTON,  
Defendants.

**Motion for Default and Judgment.**

COMES now the above-named plaintiff, by his attorney Charles E. Taylor, and moves the Court for

an order of default and judgment against the above-named defendants J. E. Riley and M. H. Marston, and each of them.

Said motion is based upon the affidavit of Geo. W. Albrecht on file herein, and upon the papers and files of said action.

CHAS. E. TAYLOR,  
Attorney for Plaintiff.

Received copy of the above motion also copy of affidavit of Geo. W. Albrecht on this — day of ———, 19—.

HENRY RODEN,  
Attorney for Defendants.

Filed in the District Court, Territory of Alaska,  
4th Div., June 27, 1913. C. C. Page, Clerk. [13]

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*In the District Court, for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,  
Plaintiff,

vs.

J. E. RILEY AND M. H. MARSTON,  
Defendants.

**[Order Denying Motion for Default.]**

This matter coming on hearing in open Court on this day upon the motion for the plaintiff for default and judgment against the defendants, and the plaintiff appearing by his attorney Chas. E. Taylor Esq., and the defendants by their attorney Henry

Roden, Esq., and after argument had, and

It appearing to the Court that upon the 12th day of September 1912 this Court had made and entered its order over-ruling the demurrer of the plaintiff to the answer of the defendants on file herein, and the Court thereupon having given leave to the defendants to file an amended answer herein, and,

It appearing to the Court that the defendants had not elected to file an amended answer herein, and the Court being fully and duly advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, and this Court does so order that the motion of the plaintiff for default and judgment against the defendants be, and the same is hereby denied, to which the plaintiff having excepted, and exception is allowed.

Done in open Court this 7th day of July, 1913.

F. E. FULLER,  
Judge.

Entered in Court Journal No. 1-I, page 463.

Filed in the District Court Territory of Alaska,  
4th Div., Jul. 7th, 1913. C. C. Page, Clerk. [14]



*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEO. W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON,

Copartners,

Defendants.

**Reply.**

COMES now the above-named plaintiff, and replying to the matters and things contained in the further and affirmative defense of the defendants, alleges:

1.

That as to paragraph 1 of said defense, plaintiff admits that his predecessors in interest entered upon the premises known as the Elliott Association, but denies that they made a pretended mining location thereon, but, on the contrary, that the said location by them made, was made in good faith and in accordance with the *require* of law on Dec. 16, 1909.

2.

That as to paragraphs 2 and 3 of said affirmative defense plaintiff denies the same, and each and every allegation therein contained.

3.

Denies each and every allegation contained in paragraph 4 of said affirmative defense.

Replying further to the second affirmative defense

of defendants answer, plaintiff denies each and every allegation therein contained.

CHAS. E. TAYLOR,  
Attorney for Plaintiff [15]

United States of America,  
Territory of Alaska,—ss.

George W. Albrecht, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and that the same is true as he verily believes.

GEO. W. ALBRECHT.

Subscribed and sworn to before me this 15th day of July 1913.

[Seal]

CHAS. E. TAYLOR,

Notary Public in and for Alaska. Commission expires Dec. 24, 1915.

Filed in the District Court, Territory of Alaska, 4th Div., July 16, 1913. C. C. Page, Clerk. [16]

[Plaintiff's Exhibit "A"—Bill of Sale—W. R. Day et al. to Raymond Blais, Ronnald Blais and ———.]

KNOW ALL MEN BY THESE PRESENTS:  
That W. R. DAY, JOHN RAAP, FRED CHURCH, J. E. FOX, W. E. GRAY, J. E. MILLER, JOHN ELLIOTT, District of Alaska, have bargained, granted sold and conveyed to RAYMOND BLAIS, RONNARD BLAIS and ——— of Iditarod, Alaska, the following described personal property, to wit: Seven-Eighths interest in the Elliott Association right fork of Boulder Creek tributary of Otter Creek

Iditarod Recording Dist for the consideration of one dollar \$1.00 to us in hand to date. All of said personal property is lawfully our own, free from all incumbrances whatever and we will defend the title to the same.

WITNESS our hand and seal this — day of March 28, A. D. 1911

W. R. DAY.

JOHN RAAP.

FRED CHURCH.

By W. R. DAY,

Atty. in Fact.

JOHN ELLIOTT. [Seal]

J. F. FOX. [Seal]

J. E. MILLER.

W. E. GRAY.

By J. F. FOX,

Atty. in Fact.

Signed, sealed and delivered in the presence of:

KARL F. THEILE.

JOHAN SPENCER.

[Endorsed]: Filed for Record at request of Raymond Blais, on the 29th day of March, 1911, at 2 P. M., and recorded in Vol. — of Deeds, page 204. Otter Recording District, Alfred E. Maltby, Recorder.

[Endorsed]: 97-I, Pl. Ex. "A" in evidence July 16, 1913. C. C. P. Clerk. [17]



**[Plaintiff's Exhibit "B"—Mining Deed, Chas.  
Purdy to W. R. Day.]**

THIS DEED made this —— day of September, 1911, between CHAS. PURDY of Flat, Iditarod, District, grantor, and W. R. DAY of same place grantee,

WITNESSETH: That the said grantor in consideration of the sum of One Dollar (\$1.00) lawful money of the United States, the receipt whereof is hereby acknowledged, has released, remised and forever quitclaimed unto the said grantee his heirs and assigns all of the right, title and interest of said grantor in and to the following described placer mining claim, situated in the District of Alaska Iditarod Recording District, described as follows: An undivided one-eighth interest in and to the Elliott Association on the Right Fork of Boulder Creek a tributary of Otter Creek in the Iditarod Recording Precinct, District of Alaska.

Together with all the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances, unto the said grantee, his heirs and assigns forever.

IN WITNESS WHEREOF the said grantee has hereunto set his hand this 4th day of September, 1911.

CHAS. PURDY.

In the presence of:

CHAS. E. TAYLOR.

H. R. SIEBE. [18]

District of Alaska,

U. S. A.—ss.

This certifies that on this 5th day of September, A. D. 1911, before me, a notary public in and for the District of Alaska, duly commissioned and sworn and qualified, personally appeared Charles Purdy, to me known to be the person whose name is subscribed to the foregoing instrument and to me acknowledged that he executed the same freely and voluntarily for the uses and purposes herein set forth.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

CHAS. E. TAYLOR,

Notary Public in and for the District of Alaska.

[Endorsed]: Recorded at the request of Geo. W. Albrecht, Sept. 7, 1911, at 1 min. past 11 o'clock A. M., in Vol. — of Deeds, at page 377, Records of Otter Recording Precinct. E. M. Stanton, Recorder.

[Endorsed]: 97 I, Pl. Ex. "B," July 16, 1913. C. C. P. Clerk. [19]

**[Plaintiff's Exhibit "C"—Quitclaim Deed, July 31, 1911, Raymond Blais et al. to W. R. Day.]**

THIS INDENTURE, made and executed on this 31st day of July A. D. 1911 by and between Raymond Blais and Ronauld Blais both of Flat Creek, Otter Precinct, Territory of Alaska, parties of the first part, and W. R. Day of the same place, party of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America, and other good and valuable consideration, to him paid, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents do hereby grant, bargain, sell, convey, assign, transfer and forever quit-claim unto the said party of the second part and to his assigns the following placer mining claim situated in Otter Precinct, Territory of Alaska, and more particularly described as follows, to wit:

All of the right, title and interest of said first parties in and to that certain placer mining claim known and described as the Elliott Association placer mining claim situated on the Right Fork of Boulder Creek, a tributary of Otter Creek, in the Otter Mining Precinct, Fourth Division of the Territory of Alaska.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD the said mining claim unto the said party of the second part and to his assigns forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hand on the day



and year first above written.

RONAULD BLAIS.

RAYMOND BLAIS.

Signed, sealed and delivered in the presence of:

DAN McCRIMMON.

F. L. KEHOE [20]

United States of America,

Territory of Alaska—ss:

THIS IS TO CERTIFY that on this 31st day of July, 1911, before me, a Notary Public in and for the Territory of Alaska, personally appeared Raymond Blais and Ronaul Blais to me known to be the persons described in and who executed the foregoing instrument and acknowledged to me that they each signed the same as his free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Notarial Seal on the day and year in this Certificate first above written.

[Seal]

F. L. KEHOE,

Notary Public in and for Alaska.

[Endorsed]: Filed for record at request of Geo. W. Albrecht on the 7th day of September, 1911, at — min. past 11 o'clock and recorded in Vol. — of Deeds, page 376. Otter Recording District, E. M. Stanton, Recorder.

[Endorsed]: 97—I, Pl. Ex. "C.," July 16, '13. C. C. P., Clerk. [21]

[Plaintiff's Exhibit "D"—Quitclaim Deed, September 15, 1911, W. R. Day to George W. Albrecht.]

THIS INDENTURE, Made this 15th day of September, in the year of our Lord, One Thousand Nine Hundred and Eleven, between W. R. DAY of Otter Precinct, Territory of Alaska, the party of the first part and George W. Albrecht of the same place, the party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do, by these presents, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following described tract, lot or parcel of land, situated, lying and being in Otter Mining and Recording Precinct, Territory of Alaska, particularly bounded and described as follows, to wit:

All of the right, title and interest of the said party of the first part in and to that certain placer mining claim known as the "ELLIOTT" Association claim, situated on Boulder Creek in the Otter Mining and Recording Precinct, Fourth Division, Territory of Alaska. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular, the

said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. R. DAY. [Seal]

Signed, sealed and delivered in Presence of:

CHAS. E. TAYLOR.

H. S. HOLMES. [22]

United States of America,  
Territory of Alaska,  
4th Division,—ss.

THIS IS TO CERTIFY That on this Fifteenth day of September, A. D. 1911, before me, Charles E. Taylor, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came W. R. Day, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal]

CHAS. E. TAYLOR,

Notary Public in and for the Territory of Alaska,  
Residing at Iditarod, Alaska.

[Endorsed]: 97-I. Pl. Ex. "D," July 16, '13.  
C. C. P., Clerk. [23]



*In the District Court Territory of Alaska, Fourth  
Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY et al.,

Defendants.

**Verdict.**

We, the jury duly empaneled and sworn to try the issues in the action wherein Geo. W. Albrecht is plaintiff and J. E. Riley and M. H. Marston are defendants, do find for the defendants and against the plaintiff.

ALBERT J. LOWE,

Foreman.

Entered in Court Journal No. 1—I, page 494.

Filed in the District Court Territory of Alaska,  
4th Div. Jul. 16, 1913. C. C. Page, Clerk. [24]

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*In the District Court for the Territory of Alaska,  
Fourth Division at Iditarod.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON,

Defendants.

**Judgment.**

This cause came on regularly to be heard on the 15th day of July, 1913, there appeared in open court the plaintiff and defendants with their attorneys, and a jury of twelve persons were regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were regularly sworn and examined and the trial proceeded with.

After all the testimony and evidence has been submitted, defendant moves the Court to instruct the jury to return a verdict in favor of the defendants and against the plaintiff, and the Court after hearing the argument of counsel grants the said motion and instructs the jury to return a verdict in favor of defendants and against plaintiff.

THEREUPON the jury find a verdict in favor of defendants, which verdict is received by the Court and filed with the clerk, and is in words as follows, to wit:

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*In the District Court for the Territory of Alaska,  
4th Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY et al.,

Defendants.

**Verdict.**

We, the jury empaneled and sworn to try the is-

sues in the action wherein George W. Albrecht is plaintiff and J. E. Riley and M. H. Marston are defendants, do find for the defendants and against the plaintiff.

ALBERT J. LOWE,

Foreman. [25]

WHEREFORE by reason of the law and the premises aforesaid:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action and that defendants recover their costs and disbursements herein.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 1—I, page 521.

Filed in the District Court, Territory of Alaska,  
4th Div. Jul. 25, 1913. C. C. Page, Clerk. [26]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY & M. H. MARSTON, Copartners,  
Doing Business as RILEY & MARSTON,  
Defendant.

**Testimony.**

This cause came on regularly for trial in the above-entitled court, at the special Iditarod term thereof,



held at Iditarod, Alaska, on the 15th day of July A. D. 1913, before the Honorable Frederic E. Fuller, United States District Judge, and a jury duly impaneled and sworn; the plaintiff appearing in person, and by his attorney, Charles E. Taylor Esq., and the defendant appearing in person and by his attorney, Henry Roden Esq., whereupon the following proceedings were had and done, and the following testimony taken, to wit: [27]

**[Testimony of Geo. W. Albrecht, in His Own Behalf.]**

GEO. W. ALBRECHT, plaintiff, appearing in his own behalf, testified as follows:

Direct Examination by Mr. TAYLOR.

Q. You are the plaintiff in this action?

A. Yes, sir: my name is Geo. W. Albrecht, I am fifty-seven years old, a citizen of the United States, a resident of the Territory of Alaska, by profession a lawyer, and by occupation commissioner of this, Otter Precinct.

Q. I will ask you if you know the Elliott Association placer mining claim on Boulder creek, and where it is? A. In a general way, yes, sir.

Q. You state in your complaint that you are the owner of that claim; by virtue of what instrument or possession do you own it? A. By a deed.

Q. Have you that deed.

Mr. RODEN.—We object to that question, because it has not been shown that any such claim as the Elliott Association claim exists.

(COURT.) I think you had better proceed in the

(Testimony of George W. Albrecht.)

regular way, and establish your location first, Mr. Taylor.

(Argument.)

(Witness excused.)

**[Testimony of C. Purdy, for Plaintiff.]**

C. PURDY, for the plaintiff, testified as follows:

Direct Examination by Mr. TAYLOR.

Q. Where do you live, and what is your occupation?

A. I live in this district; usually mining and prospecting.

Q. Do you know where you were, and who you were with, on or about the middle of December, 1909?

A. Yes, I was on Boulder creek, and with John Elliott and Joe Fox.

Q. You know Joe Fox, do you?      A. Yes, sir.

Q. I will ask you if you know the Elliott Association claim?      A. Yes, sir.

Q. Who staked that claim, do you know?

A. I and Fox and Elliott staked it.

Q. What did you do towards staking a claim?

A. I run the lines and set up some of the stakes, and Fox done the same: He wrote the location.

Q. Do you know what was on the location?

A. Oh, I couldn't repeat the full location now.

Q. How many stakes were set out, between you?

A. There were five.

Q. Where were they set in relation to the claim?

A. There is an initial stake in the center of the claim, and four corners.      [28]

(Testimony of C. Purdy.)

Q. What else did you do towards staking the Elliott Association?

A. That is about all; locating it, running the lines, and putting up the stakes.

Q. Well, you put stakes around part of the ground: Tell the Court and jury what you did to the ground.

A. Well, I helped sink four shafts on it, as far as we could get.

Q. I am asking you in regard to the staking of the claim; What did you do while you were on the ground, in regard to staking it?

A. I helped run the lines.

Q. How far up Boulder creek did you go, and what did you do when you got up there?

A. About two and a half miles, I guess. I run the lines on a claim later called the Elliott Association.

Q. Did you start at the initial post? A. Yes.

Q. Then which way did you run, and how far?

A. I think I run in a westerly direction.

Q. How far did you go in a westerly direction?

COURT.—I think you had better fix the location of this initial stake.

Mr. TAYLOR.—He says that is about two and one-half miles up Boulder creek.

A. Run thirteen hundred and twenty feet.

Q. Thirteen hundred and twenty feet: What limit was this on Boulder creek? A. On the right limit.

Q. On the right limit?

A. Well, part of the claim covered the right limit—the biggest part.



(Testimony of C. Purdy.)

Q. Tell the Court and jury where your initial stake was put?

A. It was put on the right limit of Boulder creek, about two and a half miles from the mouth.

Q. Then in what direction did you go?

A. I run in a westerly direction, I believe, thirteen hundred and twenty feet.

Q. What did you do then?

A. I run twenty-six hundred and forty feet in a southerly direction, I believe.

Q. State if you put anything at the point thirteen hundred and twenty feet from your initial post?

A. Yes, put a corner stake.

Q. Did you mark that corner stake?      A. Yes.

Q. Then which direction did you go, and how far?

A. Southerly direction, twenty-six hundred and forty feet.

Q. What did you do then?

A. Another corner post. [29]

Q. Then which direction did you go?

A. I went in an easterly direction.

Q. At right angles?      A. Yes.

Q. How far along did you go then?

A. Well, twenty-six hundred and forty feet—as near as we could get to it.

Q. What did you do then?

A. Another corner stake.

Q. Then where did you run?

A. Another twenty-six hundred and forty feet, at right angles.

Q. Then where did you go?

(Testimony of C. Purdy.)

A. I run at right angles again to the initial stake.

Q. Did you blaze out those lines, or cut out those lines at all? A. Yes, we cleaned the lines out.

Q. Did you name that location of yours?

A. Well, I didn't name it myself.

Q. Did you see it named, and what was it?

A. Yes, the Elliott Association.

Q. Do you remember in whose name it was staked?

A. I see later, on the books, it was staked in Fox's name.

Q. Your name was on that stake, was it?

A. Yes, sir.

Q. Who wrote the location notices on that stake?

A. Joe Fox.

Q. And you saw him do it, did you?

A. No, I don't believe I was there when he wrote it: I was on the claim though.

Q. You say you don't remember whose names were on the stakes?

A. I can remember some of them: I don't remember them all.

Q. Will you state those whom you remember?

A. There was Day, and John Elliott, Fox and Gray—Bill Gray—I don't remember any more—and my own.

Q. How many acres were in that claim?

A. There was supposed to be a hundred and sixty.

Cross-examination by Mr. RODEN.

Q. You were not present when the names were put on any of the stake you didn't see anybody write any of the names on the stakes itself?

(Testimony of C. Purdy.)

A. No, I don't believe I did: I can't just remember. I was there very shortly after.

Q. And when you came there—that's when you found the names? A. Oh, I was there before—

Q. (Interrupting.) I mean when you came there shortly after? A. Yes. [30]

Q. Now how they came on there, you don't know: you couldn't swear as to how they got there, except as to what some one may have told you. You didn't see them put on there, did you?

A. No, I didn't see them—I don't think I saw them—I don't just remember—I was right close by them. I know Fox wrote them—I was right close there.

Q. Well, you may have been, or may not?

A. I know I was right close.

Q. Now that is all you know about the location of that claim, as far as you have testified; that's all you know about it? A. Yes.

Redirect Examination by Mr. TAYLOR.

Q. As a matter of fact you know those names were on the stake, don't you?

A. Yes, I know they were on the stake.

(Testimony of witness closed.)

**[Testimony of J. F. Fox, for Plaintiff.]**

J. F. FOX for the plaintiff, testified as follows:

Direct Examination by Mr. TAYLOR.

Q. Where were you on or about the middle of December, 1909, and what were you doing?

A. Well, to the best of my memory I was on



(Testimony of J. F. Fox.)

Boulder, staking a piece of ground.

Q. What did you do when you staked it?

A. I first put the initial stake, and wrote the names and wrote the location.

Q. Could you state at this time what names you put on the stake?

A. I don't just remember all the names I put on, at the present time.

Q. And what did you do after you had written the names?

A. Well, Mr. Purdy and Mr. Elliott was up there with me, and I told them to go six hundred and sixty feet to the right limit of the claim and put up the corner, and they were doing that while I was writing the initial. After they got through, I helped them run out the line for that corner, and then we went from that corner and put up the left limit corner six hundred and sixty feet from the initial stake; and then we run our line downstream on the left limit, and established another corner. It came night on me at that time, and I had to go back to Two Below on Boulder to my cabin, and Mr. Purdy and Mr. Elliott finished staking the ground, and running the lines and running up the other corners.

Q. Were you ever on that ground after that?

A. Yes, sir, several times.

Q. Did you ever see the other corners they put up?

A. Yes, sir.

Q. What did you do towards marking the boundaries, if anything?

A. I see that there was five corners there, and the

(Testimony of J. F. Fox.)

lines blazed out all round the piece of ground.

Q. What did you call the claim?

A. The Elliott Association. [31]

Q. Did you ever record it? A. Yes, sir.

Q. You say you established a corner six hundred and sixty feet on each side?

A. Yes, from the center stake.

Q. What is the size of the claim?

A. Thirteen hundred and twenty feet by five thousand two hundred and eighty.

Q. That is to the best of your recollection?

A. That is an eight-claim association.

(Testimony of witness closed.)

**[Testimony of Geo. W. Albrecht, in His Own Behalf (Recalled).]**

GEO. W. ALBRECHT, plaintiff, recalled, further testified in his own behalf as follows:

Direct Examination by Mr. TAYLOR.

Q. I will ask you if you are custodian of the records of Otter Precinct, and have you, as such custodian, a record of the Elliott mining association on Boulder creek?

A. (Witness consulting records.) I am custodian. Volume one, page 221, appears under index number 762, filed for record at the request of J. F. Fox, on the 4th day of February, 1910, at 30 minutes past 12 P. M. (Reading.) "Notice of Location. Notice is hereby given that the undersigned has located 160 acres of placer mining ground situate in Otter Recording District of Alaska, on Boulder

(Testimony of George W. Albrecht.)

creek, a tributary of Otter creek, to be known as the Elliott claim, described as follows to wit: Commencing at initial stake and running in a westerly direction 1320 feet; thence 2640 feet in a northerly direction; thence 2640 feet in an easterly direction; thence 2640 feet in a southerly direction; thence 1320 feet in a westerly direction to initial stake. Gold discovered February 15, 1910. Located December 16, 1909. J. Elliott, J. E. Miller, J. Day, Fred Church, J. F. Fox, C. Purdy, Wm. Gray, J. Raap, Locators, by J. F. Fox, agent. Witness: C. Purdy."

(Witness excused.)

**[Testimony of J. F. Fox, for Plaintiff (Recalled).]**

J. F. FOX, recalled, further testified for the plaintiff as follows:

Direct Examination by Mr. TAYLOR.

Q. I would like to ask you what you did with your interest in that claim?

A. I sold my interest to William Day, and also Charlie Purdy. He was interested with me at the time I sold.

Q. I will hand you a paper; do you recognize that paper? and is that your signature?

A. Yes, I recognize the paper, and that is my signature.

Q. You stated last evening that you staked a mining claim on Boulder creek, which you called the Elliott Association? Just describe the boundaries of that location again, will you.



(Testimony of J. F. Fox.)

A. Describe that location? I made a mistake in describing it. [32]

Q. You can correct it.

A. I will state it correctly, as I saw it. We started on the upstream line, put up the initial stake in the center of the claim, and ran thirteen hundred and twenty feet towards the right limit of the claim, and put up the corner stake. Mr. Elliott and Mr. Purdy done that while I was writing.

Mr. RODEN.—We object to that testimony, unless he actually saw that.

(To Witness.) Did you see them do that?

A. Yes, I went over to the corner. I went over to the initial stake. I helped to run the line to that corner. I went to that corner myself.

Mr. RODEN.—(To Witness.) You helped them run the line?

A. Yes, between the initial stake and the corner.

Q. (Mr. TAYLOR.) Then what did you do?

A. Then we went to the left limit and put up another corner thirteen hundred and twenty feet from the initial stake—that is, guessing the distance—we didn't measure the distance.

Q. I understand. Then what did you do?

A. Then we ran our line down twenty-six hundred and forty feet, and established another corner—that is, downstream,—on the left limit of the claim.

Q. And then?

A. Night came on us, and we went home to Otter creek.

Q. Did you go back?

(Testimony of J. F. Fox.)

A. I didn't, no. Mr. Elliott and Mr. Purdy finished the location alone, the staking of it.

Mr. RODEN.—We object to that. (To witness.) Did you see them do it?

A. I didn't, but I was on the ground afterwards.

Q. Did you see the other stakes after they were set out?

A. Yes I saw them after they were set out.

Q. And you know there were four stakes, one on each corner of that claim?

A. Yes and the initial stake.

Q. One on each corner and the initial stake. Now what did you do towards marking the boundaries, or blazing the lines?

A. Well I helped them run the upper end line, and the left limit side line, adjoining the creek claim on Boulder.

Q. You say you blazed some of the lines yourself?

A. I helped blaze the upper end line and one side line—left limit side line.

Q. Did you make a discovery of gold on that claim? A. Yes, sir.

Q. State under what circumstances?

A. I don't know what date I went up there: The boys had been working there some time when I went up to see them again. They had sunk one hole down until they got drowned out. When I was there they was working on the third hole. They got the second hole as far as they could, on account of water, and it was in the second hole I panned.

Q. You say you panned: what did you find?

(Testimony of J. F. Fox.)

A. I found gold.

Q. How many pans did you pan there, and what was in them?

A. To the best of my memory I panned three pans, and there was a little gold in all three of the pans.

[33]

Q. You say you copied the location notice; what did you do with that location notice?

A. Well, I brought it down there and recorded it, and afterwards I had it out to my cabin on Otter creek. Last fall when I went Outside I took the papers with me, and I don't know whether I took it with me or not.

Q. I will ask you if you have made diligent search for that location notice?

A. I went out there, at your request, and looked for it, and didn't find it.

Q. Do you know where it is?      A. I don't.

Mr. TAYLOR.—Now, may it please the Court, seeing that the original location notice is lost, I would offer in evidence the record of that location.

COURT.—It has been received has it not?

Mr. TAYLOR.—We ask that it be received in evidence for the purpose of establishing the location.

Q. I will ask you where does Boulder creek lie, with relation to Granite creek? and how far away?

A. It lies across the ridge, in a westerly direction; This pup that we staked on heads up pretty well against a branch of Granite creek. I never went across there to Granite myself, so I don't know what distance it would be across from the head of Boulder



(Testimony of J. F. Fox.)

to the head of Granite.

Q. And you say Boulder creek flows into Otter?

A. Yes, sir.

Q. Have you seen any gold on Otter creek?

A. Yes, sir.

Q. There is gold on Otter creek, is there?

A. Yes, sir.

Q. Did you have any work done on that claim in 1910?      A. Yes, sir.

Q. Do you know what work was done there?

A. I wasn't up there when the boys quit work? I was up there probably a month after they started in there.

Q. What did you see up there?

A. They started up a drain, and when I was there they had run it up to the best of my knowledge, from a hundred and fifty to two hundred feet. I didn't measure the ground—just looked at it. That would be my judgment of it.

Q. How deep was the drain?

A. Well, they started at the surface at the lower end, and when I was there the upper end was down ten feet from the surface.

Q. How long have you been mining?

A. Well, I can't say about mining; I have been mining some and prospecting ever since 1897, in this country.

Q. I will ask you if the discovery of gold that you made on Boulder creek was such as, in your opinion, would warrant you putting up further work or money in the prospecting of that claim.

(Testimony of J. F. Fox.)

A. Yes, sir, I had more work done under that head.  
[34]

Q. Now, I will ask you, Mr. Fox, what induced you to stake that claim out there?

A. Well, to the best of my judgment, I was satisfied there might be some pay on that creek.

Q. Have you altered that opinion?

A. I haven't changed my opinion in regards to there might be pay on that creek yet.

Q. You stated yesterday, Mr. Fox, that you sold your interest; I will show you an instrument, and ask you if this is your signature? (Submitting document to witness.)

A. Yes, sir, this is my signature here, in two places.

Q. What do you mean by that?

A. I located for J. E. Miller and W. A. Gray on power of attorney and when I signed this as a deed, I signed "J. E. Miller and W. A. Gray, by J. F. Fox, attorney in fact."

Q. You had that power of attorney, did you?

A. Yes, sir.

Cross-examination by Mr. RODEN.

Q. Now who was up there with you and made that location?

A. Mr. John Elliott and Mr. Charley Purdy.

Q. And you say you located for whom up there—for yourself and besides whom?

A. Myself and W. A. Gray and—

Q. (Interrupting.) Who is this man Gray?

(Testimony of J. F. Fox.)

A. Him and Dave Edwards have a store over at Cripple. He is a partner of Dave Edwards.

Q. Ever been in this section of the country?

A. Yes.

Q. Was he in this section at the time you were up there? A. Yes.

Q. What was he doing up there?

A. Looking for ground, the same as I was.

Q. I suppose he gave you an interest for staking for him? A. Yes, sir.

Mr. TAYLOR.—Object to that as not proper cross-examination.

(After argument.)

COURT.—I think he has a right to inquire into the circumstances. The objection is overruled.

Q. I suppose he promised you an interest for staking for him?

Mr. TAYLOR.—Just a moment. We object to that as incompetent, irrelevant and immaterial.

COURT.—The objection is overruled.

Mr. TAYLOR.—We take an exception, if your honor please.

Q. (By Mr. RODEN.) Now you say you had an understanding with Mr. Miller for a half interest in that claim.

A. No, sir, you asked about Gray. [35]

Q. We were talking about Gray? A. Yes.

Q. Did you get an interest from him?

A. I got the equivalent from him.

Q. What did you get?

A. I sold his interest with the balance.



(Testimony of J. F. Fox.)

Q. And you got half of his money?

A. He wouldn't accept any of it.

Q. He wouldn't accept any of it?

A. No, sir, he let me have that for the work I did on the ground.

Q. For the staking?      A. Yes.

Q. It was understood that you were to get half before you staked?

A. Yes, sir, that was agreed between us.

Q. And Gray was over there at the time?

A. No, he was over here at the time I located.

Q. Now you also located for Mr. Miller, did you?

A. Yes, sir.

Q. Who is this man Miller?

A. He is an old friend of mine from the Outside.

Q. That isn't the man they call Tom Miller?

A. No, sir.

Q. He has never been in Alaska?      A. No, sir.

Q. Now did you have a written power of attorney from him when you located?      A. Yes, sir.

Q. Did you have any understanding with him as to what you should receive for your services?

A. No, sir.

Q. Now you also sold his interest, didn't you, under your power of attorney.      A. No, sir.

Q. Now did you pay him for that?      A. No, sir.

Q. Now is there anyone else you staked for?

A. Nothing, only writing the names.

Q. Now you went upon that ground some time in December, 1909, didn't you and made this location?

A. Yes, sir.

(Testimony of J. F. Fox.)

Q. Now what kind of ground is that up there, I mean so far as being timbered and so forth is concerned?

A. Well, there is quite a lot of timber, inside the boundaries of our lines, if you allow our lines as I show them here. [36]

Q. Pretty heavily timbered, isn't it?

A. One side of the claim is, yes.

Q. Which side is that? A. The right limit.

Q. Now that ground covers the bench, doesn't it?

A. Yes, part of the bench.

Q. Now what is the formation of that ground?

A. The rock formation—

Q. Yes?

A. Well, the gravel shows granite, slate, porphyry.

Q. Is there any gravel on the ground? A. Yes.

Q. What kind of gravel?

A. Well, the top surface shows quite large boulders, a mixed lot of formation, granite, slate, and porphyry and other rocks.

Q. Now you say you have not changed your opinion as to the value of that ground as a mining claim?

A. No, sir, I didn't say as to a mining claim; I said as to being gold in paying quantities.

Q. As to being what?

A. To being gold on the ground in paying quantities. That is, I haven't changed my opinion as to being gold on the ground that would pay to work.

Q. You still think there is a chance?

A. Yes, sir.

Q. What makes you think so?

(Testimony of J. F. Fox.)

A. Well, simply on account of locality, as it lies there.

Q. Well, what locality does it lie in?

A. It lies—the formation is cut by the granite and slate and a porphyry formation, just the same as it is on Otter creek.

Q. Well, now, it lies practically square to Otter creek doesn't it at right angles?     A. Yes, sir.

Q. Now you formed that idea early in 1910?

A. Yes, sir.

Q. And when were you on the claim again after that?

A. I don't know just what month it was. I was in there in the spring of the year, after water was running.

Q. That would be probably April or May, 1910?

A. I wouldn't be certain of the date.

Q. Did you ever do any work on that claim yourself?

A. No, sir—that is, you mean work as mining?

Q. Was there anyone on the claim in 1910 when you went back there?     A. No, sir. [37]

Q. Now do you know of any mining operations that have been carried on on that claim since 1910? Did you do any mining work, that you know of, after say the first day of May, 1910?

A. There was a lay let on that claim after the spring of 1910.

Q. When was that lay let, and who had the lay?

A. I couldn't tell as to the date; I couldn't tell the party's name—and still I signed the lease.



(Testimony of J. F. Fox.)

Q. Do you know whether or not he went into possession of the ground?     A. I don't.

Q. At the time you sold, where were you when that deal was made, were you on the claim?

A. No, sir.

Q. Do you know whether or not any of your associates in that claim have done any work since you were there in, say, May, 1910?     A. No, sir.

Q. You say you sold to Day?

A. Yes, sir, sold to Day in the first place.

Q. Have you any knowledge of any work of any kind being done on that claim?     A. Yes, sir.

Q. What is it, and who did it?

A. Cutting the timbers, Mr. Day.

Q. Mr. Day is one of the locators of that claim, the Elliott Association?     A. Yes, sir.

(Witness excused.)

**[Testimony of Charles Purdy, for Plaintiff  
(Recalled).]**

CHARLES PURDY, recalled, further testified in behalf of plaintiff, as follows:

Direct Examination by Mr. TAYLOR.

Q. What work did you do towards blazing the lines out on this Elliott Association?

A. Well, it appears to me I blazed one side and one end line out after Mr. Fox had gone away, I and Elliott.

Q. Have you seen the whole of these stakes?

A. Yes.

Q. When did you see them last?

(Testimony of Charles Purdy.)

A. Well, I see them in the fall of 1910.

Q. You have sold your interest in that claim?

A. Yes, sir.

Q. I will hand you an instrument, and ask you if you recognize that, is that your signature?

A. Yes, sir.

Mr. TAYLOR.—Plaintiff offers in evidence a deed from Charles Purdy to W. R. Day, of an undivided one-eighth interest in and to the Elliott Association.

[38]

Mr. RODEN.—No objection.

(Plaintiff's Exhibit "B.")

Cross-examination by Mr. RODEN.

Q. Now as I understand you at the present time, that claim is twenty-six hundred and forty feet square? A. Yes.

Q. Or at least supposed to be? A. Yes.

Q. And you were mixed up in that a little last night? A. No, I wasn't.

Q. Now when you saw those stakes in the fall of 1910, what stakes did you see at that time?

A. I see the whole five stakes.

Q. Now what kind of land is that embraced within these stakes, I mean as far as being timbered or brush is concerned, or anything like that?

A. Oh, there is some brush covering most of it, and there is some quite heavy timber on it.

(Witness excused.)

**[Testimony of W. R. Day, for Plaintiff (Recalled).]**

W. R. DAY, recalled, further testified on behalf of plaintiff as follows:

Direct Examination by Mr. TAYLOR.

Q. What is your occupation and where are you working now?

A. Laboring man, working for George Riley.

Q. Is Mr. Riley the defendant in this action?

A. Yes, sir.

Q. I will ask you if you know the Elliott Association on Boulder creek; were you ever on there; and if so when?

A. Yes, I know, I was there in 1909, and on there in 1910, and on there in 1911 at different times.

Q. You were included among the names of the stakers of that claim, were you not?     A. I was.

Q. I will show you a bill of sale, and ask if you recognize it.     A. Yes, sir.

Q. I will ask you if you signed that instrument?

A. I did.

Q. Is that your signature on there?

A. That is my signature.

Q. Did you sign anybody else's name on there?

A. I did.

Q. Whose name did you sign?

A. John Raap's and Fred Church's.     [39]

Q. You had their power of attorney, did you?

A. I had.

Q. I will ask you if you saw John Elliott sign that?

A. I did.



(Testimony of W. R. Day.)

Mr. TAYLOR.—If Your Honor please, plaintiff offers in evidence a bill of sale from W. R. Day, John Raap, Fred Church, J. E. Fox, W. E. Gray, J. E. Miller and John Elliott, to Raymond Blais and Ronald Blais, of seven-eighths interest in the Elliott Association, right fork of Boulder Creek.

Mr. RODEN.—To which, if Your Honor please, we object, for the reason that the purported paper, desired to be offered in evidence recites on its face that it is a bill of sale, and if it is to take the place of a deed, it is not executed with such formalities as are required by law, for the reason, first: that it has not been shown that W. R. Day had any interest in the Association Claim; second: That it has not been shown that John Raap constituted or authorized anybody to convey any property, and particularly to convey any real estate of which he was the owner, to any person; third: That it has not been shown that J. E. Miller and W. E. Gray authorized any person to convey any real estate that they, or either of them, might be possessed of in the Territory of Alaska, or anywhere; and, lastly: That this purported transfer is not executed as required by law, for the reason that it purports to convey an interest in real estate, and execution thereof has never been acknowledged before a notary public, or before any officer authorized to take any acknowledgment, and that the execution thereof has never been proven before any such officer by any of the witnesses thereto. For these reasons we object to the introduction of it.

Mr. TAYLOR.—If the Court please, I hardly

(Testimony of W. R. Day.)

think the defendants here are in a position to attack that collaterally inasmuch as the parties who made the deed are the ones who are testifying to it, nobody else can object.

COURT.—I think this witness did testify in regard to the power of attorney, without objection on your part. I suppose that is sufficient—and that Mr. Fox did also. If you had objected at that time, it would have been necessary to have shown a written power of attorney. I think each of them testified, without objection, that they had power to make this transfer.

(After further argument.)

COURT.—This is certainly an informal instrument, but I think it may be admitted. I think these requirements as to formality relate more particularly to requirements of record.

Mr. RODEN.—We take exception to the ruling of the Court at this time, admitting the bill of sale.

(Bill of Sale marked “Plaintiff’s Exhibit A.”)  
[40]

**[Testimony of F. L. Kehoe, for Plaintiff.]**

F. L. KEHOE, for the plaintiff, testified as follows:

Direct Examination, By Mr. TAYLOR.

Q. I hand you a paper, and ask you if you recognize that?      A. I do.

Q. You are the acknowledging officer in that jurat, are you?      A. I am.

Q. Did you see that paper executed?      A. I did.

Q. I will ask you if that is the signature of Ronald

(Testimony of F. L. Kehoe.)

Blais, and of Raymond Blais?      A. It is.

Q. You acknowledged the instrument?

A. I did, yes, sir.

Mr. TAYLOR.—If the Court please, we offer in evidence a quit-claim deed, dated 31st July, 1911, from Raymond Blais and Ronald Blais to W. R. Day, conveying all the right, title and interest of the said parties of the first part to the parties of the second part, in and to that certain Association Placer Mining Claim known and described as the Elliott Association.

Mr. RODEN.—We object to the admission of it, for the reason that it has not been executed as required by law. It is not acknowledged by a notary public or other officer authorized to take acknowledgment, and the instrument has never been proved by any subscribing witnesses as having been executed.

COURT.—This appears to have been acknowledged. It may be received.

(Plaintiff's Exhibit "C.")

**[Testimony of W. R. Day, for Plaintiff (Recalled).]**

W. R. DAY, recalled, further testified on behalf of the plaintiff as follows:

Direct Examination, By Mr. TAYLOR.

Q. I will show you another instrument, Mr. Day, and ask you if you recognize that, and is that your signature?      A. Yes, it is.

Q. You signed this?      A. Yes.

Q. To whom did you give that deed?

A. The deed is to George W. Albrecht.



(Testimony of W. R. Day.)

Q. Did you give it to him?     A. Why, I think so.

Mr. RODEN.—We move that the answer be stricken out. It doesn't matter what the witness may think.

COURT.—The motion is denied. It may stand for what it is worth.

Mr. TAYLOR.—If the Court please, I think that this will necessitate me taking the stand myself, inasmuch as I am the acknowledging officer. [41]

[**Testimony of Charles E. Taylor, for Plaintiff.**]

CHARLES E. TAYLOR, for the plaintiff, testified as follows:

WITNESS.—I want to say that the instrument purporting to be a deed from W. R. Day to George W. Albrecht, conveying all of the interest of Day in and to the Elliott Association claim on Boulder creek, was signed, sealed and delivered by Day to Albrecht in my presence.

Mr. TAYLOR.—I now wish to offer the deed in evidence.

(Plaintiff's Exhibit "D.")

[**Testimony of W. R. Day, for Plaintiff (Recalled).**]

W. R. DAY, resuming the witness-stand.

Cross-examination by Mr. RODEN.

Q. Where did you make that deed that has just been admitted in evidence?

A. Why, I made it in the office of Charles E. Taylor, I think. I think I did.

(Witness excused.)

**[Testimony of Geo. W. Albrecht in His Own Behalf  
(Recalled).]**

GEO. W. ALBRECHT, recalled, further testified in his own behalf as follows:

Direct Examination by Mr. TAYLOR.

Q. I will ask you if you have seen that instrument before? and from whom did you receive it?

A. W. R. Day.

Q. I will ask you what you did in regard to taking possession under this deed?

A. I think the first act was to record the deed. I never have attempted to take actual physical possession of the property. I have been on the property—examined the lines, and had the assessment work performed, for which I paid.

Q. When was this?

A. Which one of the acts do you refer to?

Q. When did you have the assessment work performed?     A. December of 1912.

Q. As Recorder, have you got a record of that assessment work being done?     A. Yes, sir.

Q. Can you produce that record?

A. I think so.

(Witness procures record.)

Q. I will ask you to look at that instrument and identify it. (Submitting.)     A. I do.

Mr. TAYLOR.—If the Court please, we offer in evidence an affidavit of labor of C. C. Chittick, as follows: (Reads affidavit:) “Territory of Alaska, Fourth Division, Otter Precinct, ss. C. C. Chittick being first duly sworn, on oath says: That he makes

(Testimony of George W. Albrecht.)

this affidavit for the purpose of complying with the law as to the performance of [42] annual labor, and of filing and recording proof of the same, for the year 1912. That the mining claim upon which labor has been performed and improvements made is the Elliott Association Placer Mining Claim at the head of Boulder creek, a tributary of Otter creek, which flows into the Iditarod River, in said above Otter Precinct. That this affiant and A. A. Chittick did ten day's work upon said claim, cutting brush and trying for prospect holes. That said work was done and improvements made between the 25th day of November, 1912, and the 9th day of December, 1912, both inclusive. That George W. Albrecht paid Two Hundred Dollars (\$200.00) for said work and improvements. C. C. Chittick. Subscribed and sworn to before me this tenth day of December, 1912. George W. Albrecht, Notary Public in and for the Territory of Alaska, residing at Iditarod."

Q. Is that recorded? A. Yes, sir.

Q. In what book?

A. Volume One of Annual Labor.

Mr. RODEN.—We object to its introduction in evidence, because it is not such an affidavit as the law contemplates, and since it is not, it is not entitled to record, and the party causing it to be recorded secures no right or benefit under it whatsoever.

COURT.—The affidavit itself is, of course, inadmissible.

Q. In what book has this been recorded?

A. Volume One of Annual Labor.



(Testimony of Geo. W. Albrecht.)

Mr. TAYLOR.—We offer the Record, Page Thirty-seven.

COURT.—Well, it has not been identified as a record. The record itself must be offered, or else a certified copy.

Mr. TAYLOR.—We offer the record itself.

COURT.—I understand Mr. Roden's objections were as to the contents of the instrument. It doesn't conform to the statute in regard to affidavits of labor.

Mr. RODEN.—If he simply wants to introduce it as a record, he may do so. That is all right. But we object to its introduction because it cannot have any possible influence upon the issues in this case, and it just simply burdens the record uselessly. It can have no force or effect whatsoever—the introduction of the record.

COURT.—It seems to me that since the record is offered as a record that the affidavit does not contain the different matters that are required to be contained in an affidavit of labor.

Mr. TAYLOR.—We offer the record of that affidavit of labor.

COURT.—The objection is sustained as to the offer.

Mr. TAYLOR.—We note an exception.

(Witness excused.) [43]

**[Testimony of Robert Mann, for Plaintiff.]**

ROBERT MANN for the Plaintiff, testified as follows:

Direct Examination by Mr. TAYLOR.

Q. What is your occupation?      A. Laborer.

(Testimony of Robert Mann.)

Q. What were you doing in the fall of 1911—and winter, and where?

A. The fall of 1911 I was cutting wood on Boulder creek.

Q. Do you know where the Elliott Association is on Boulder creek?      A. Yes.

Q. Who were you cutting wood for in 1911?

A. Well, I cut for Mr. Riley in the fall. When I went to cutting I was cutting for myself.

Q. With whom were you cutting?

A. A fellow by the name of Jim Furlong and Jim Kelly.

Q. You were partners, were you?

A. No, sir, nothing but the grub.

Q. You were cutting together, were you?

A. No sir; cutting wood in the same locality, but each one cutting for himself.

Q. Where were you cutting wood?

A. Well, I was cutting on the head of Boulder creek.

Q. Did you cut wood on the Elliott Association?

A. I cut wood on what purported to be the Elliott Association afterwards, but I didn't know it was the Elliott Association when I went to cut there.

Q. How much wood did you cut up there?

A. A hundred and thirty-eight cords, as near as I can remember.

Q. Did you see anybody else cutting wood on the Elliott Association at that time?

A. Yes, sir, they told me it was the Elliott Association.

(Testimony of Robert Mann.)

Q. Who was cutting there?

A. A man by the name of Johnson, a man by the name of Roberts, a man by the name of Murdoch, and a man by the name of Jones, and Furlong and Kelly and myself.

Q. Furlong was cutting on it?      A. Yes.

Q. And Kelly?      A. Yes.

Q. What became of the wood you cut?

A. I sold it to Mr. Riley.

Q. What did it cost; how much did it cost—that wood—to cut it?

A. Well I didn't make any more than wages. I got six dollars a cord for it.

Q. And was that wood delivered to Riley & Marston?

A. It was delivered to Riley & Marston on the ground. [44]

Q. Did you cut for Riley & Marston?

A. I promised to sell my wood to Riley & Marston for his going security for my groceries at the store, I promised to sell him wood—I had been cutting for some time.

Q. Didn't you say awhile ago that you started to cut wood for Riley & Marston?

A. No, sir, I didn't say anything of the kind.

Q. When did you start to cut wood up there?

A. Along the latter part of March, 1911.

Q. When did you get there, on that particular claim?      A. September, 1911.

Q. Did you ever have any conversation with Riley



(Testimony of Robert Mann.)

& Marston about the wood; as to any probable law suit?

A. I don't remember that I ever did. Oh, I did too.

Q. Kindly state to the Court and Jury what that conversation was.

A. There was a man by the name of Blais came there, and he claimed the ground, and asked me if I wouldn't let him have the wood, and he was going to get a team that fall and deliver it all and sell it himself; that he could sell all the wood there was up there; and I believe I spoke to Riley about it at the time, or shortly afterwards, and asked him if he thought there was going to be any trouble about it, and he said he didn't think there was. Blais was hauling and cutting the wood for himself for sale. As near as I can remember the conversation, that is the only conversation I had in regards to it.

Q. Did you have any understanding with Mr. Riley or Mr. Marston as to what position you would be in, if there was any trouble?

A. Not that I remember of.

Q. I will ask you if that is all the conversation you ever had with Mr. Riley regarding the matter?

A. Later in the fall we had several conversations. He said he was being sued for taking the timber off a mining claim, and he asked me if I ever found any prospects up there, if I ever prospected any around the old shafts, and I told him I had, and he asked me if I ever found anything, and I told him nothing as far as I had seen.

(Testimony of Robert Mann.)

Q. What, if anything, did Mr. Riley tell you?

A. He told me he was going to get some man, and go up and pan around those holes, and asked me to show them where they were.

Q. Was anything said in regard to this law suit he was having?

A. He said he thought he was going to have a law suit, at the time that he went up.

Q. When was this?

A. That was in 1912, the fall of 1912.

Q. Did he say anything to you when you were on the ground cutting wood, as to any probable trouble there would be about it?

A. I was on the ground cutting wood then.

Q. In 1912?      A. Yes, sir.

Q. That was in the early spring, wasn't it?

A. That was in the fall. I was there two years, lived in the same cabin two years. [45]

Q. Was this this last fall that you were up there?

A. Yes, sir.

Q. Cutting wood?      A. Yes, sir.

Q. Do you know if Mr. Kelly was working under the same conditions that you were?

A. Yes, he was.

Q. Do you know if Mr. Furlong was working under the same conditions?      A. Yes, sir.

Q. You say you promised to sell the wood to Messrs. Riley & Marston, if they would secure your grocery bills?      A. I did.

Q. Did they secure your grocery bills?

A. Yes, sir.

(Testimony of Robert Mann.)

Q. When did you sell your wood to Messrs. Riley & Marston?

A. Do you mean when I got paid for it.

Q. When did you sell it to them?

A. Well, I sold it to them the 15th of October, or along between the 15th of October and the first of November, 1911, the first time, and 1912 the second time. About the same time each year. I couldn't say exactly as to dates.

Q. And you were working for them with that understanding all the time. About how much wood did you sell to them in 1911?

A. One hundred and thirty-eight cords—one hundred and fifty-eight; it was either one hundred and thirty-eight or one hundred and fifty-eight. I know I had two or three different lots of it. I couldn't say for sure. Either a hundred and thirty-eight or a hundred and fifty-eight.

Q. Do you know when they took delivery of it?

A. They took delivery of it the time I sold it to them, the time they paid me for it.

Q. Do you know when the wood was taken off?

A. It was taken off in the winter of 1911—the winter of 1911 and the winter of 1912.

Q. What dates, do you remember?

A. I couldn't say as to the dates.

Q. Do you know the month?

A. Well, when the first heavy good sleighing came, but I couldn't say what month it was.

Q. It was pretty good sleighing, was it?



(Testimony of Robert Mann.)

A. Yes, it was good sleighing before they started in to haul. [46]

Cross-examination, by Mr. RODEN.

Q. You say you commenced cutting some time in March, 1911? A. Yes, sir.

Q. And you cut altogether a hundred and thirty-eight cords? A. The first year?

Q. Yes?

A. On that piece of ground. Further down the creek I bought some more timber.

Q. Now when you got up there, in March, 1911, did you survey and look around the place you were going to cut? A. Yes, sir I did.

Q. Now what did you find?

A. Well, I found a lot of piles of logs, and teams hauling off of there—two teams hauling off there.

Q. Do you know whose logs they were, or whose teams?

A. There was several large piles of logs, and there was teams hauling off of there.

Q. Do you know who was hauling them off?

A. I know one of the men—Lee Roby.

Q. For whom was he hauling, do you know?

A. I couldn't say.

Q. And you say you found Johnson cutting wood up there?

A. Yes, he came there the same time I did.

Q. Where did he cut?

A. Well, I suppose he was cutting on a portion of the Elliott Association, from the way I could trace the lines there.

(Testimony of Robert Mann.)

Q. And Roberts?

A. The same. He was cutting further up.

Q. And Murdoch?

A. He was cutting with Roberts; they were partners.

Q. And Jones?

A. Jones was cutting on what I supposed was the same piece of ground.

Q. Now you spoke about Blais being up there?

A. Blais showed me where the ground was. That was why I believed that Johnson and Jones and Murdoch and all those fellows were cutting on that ground. It was Blais showed me the ground.

Q. Blais pointed out the Elliott Association to you? A. Yes.

Q. And what did he say about this wood?

A. He asked if I would sell it to him, that he would get a team and haul it, and I told him no. I had been there several weeks before Blais ever came up there.

Q. Did Blais say anything about cutting the wood himself?

A. Yes, sir he told me he was going to cut it himself. [47]

Q. Now when you went up there to cut, did you have any understanding with Riley & Marston as to where, in what particular place, you were to cut wood? A. No, sir, I did not.

Q. Isn't it a fact that Riley & Marston never knew, or at least didn't know for a long time, where you were cutting wood?

A. I don't know that they ever knew until they

(Testimony of Robert Mann.)

came up to receive it. I never saw them on the creek.

Q. All the proposition was that you would sell your wood wherever you might cut it?

A. That I would sell it to them for six dollars a cord.

Q. So you were not their employee: you were not working for Riley, were you?

A. I didn't consider that I was, no, no more than he would expect me—he would be wanting me to work, to make sure he would get his money out of the supplies I was getting.

Q. Now you say you cut a hundred and thirty-eight cords of wood altogether that year?

A. Yes, sir—I think it was a hundred and fifty-eight—I couldn't say for sure, but it was in that neighborhood,—either a hundred and fifty-eight that I had and a hundred and thirty-eight that Kelly had, or it was a hundred and thirty-eight that I had and Kelly a hundred and fifty-eight.

Q. Now how much wood did you cut between the first day of October, 1911, and the first day of January, 1912?

A. I cut two hundred and two and a half cords.

Q. When did you cut?

A. From the time Riley & Marston received my cord wood in 1911 until the time they received it in 1912. The last year they received it——

Q. (Interrupting.) I am not asking you about the last year. I am talking about the first day of



(Testimony of Robert Mann.)

October, 1911, and the thirty-first day of January, 1912.

A. Oh, I understand now. Excuse me. I didn't cut any wood on the Elliott Association at all.

Q. Now the wood which you did cut between those two dates, where was that cut?

A. That was out on a little pup, away further down the creek, and from the right limit.

Q. Now let me ask you this question. Did Riley & Marston get a stick of wood off the Elliott Association Claim, between the first day of October, 1911, and the 31st day of January, 1912?

A. No, sir, they didn't.

Q. Not a stick? A. Not a stick.

Q. Do you know whether or not Riley & Marston received a stick of wood between these dates from Jim Kelly?

A. Jim Kelly didn't cut between those dates. He was through cutting. [48]

Q. Did they get a stick of wood that was cut between the first day of October, 1911, and the 31st day of January, 1912, from the Elliott Association Claim, that was cut by Jim Furlong?

A. No, sir, they didn't.

Q. So, in other words, you didn't cut a stick of wood on the Elliott Association between the first day of October, 1911, and the 31st day of January, 1912?

A. No, I was through cutting there then.

Q. Do remember what time in the month of Sep-

(Testimony of Robert Mann.)

tember, 1911 you quit cutting wood from the Elliott Association?

A. I am almost sure that I got through about the middle of September.

Redirect Examination by Mr. TAYLOR.

Q. What became of the wood that you did cut on the Elliott Association?

A. I sold it to Riley & Marston.

Q. When did they take it off there?

A. Sometime during the winter, in the first sleighing.

Q. How much did you cut on the Elliott Association?

Mr. RODEN.—We object to these questions, for the reason that they are no rebuttal testimony, and have already been answered. (After argument.)

COURT.—You may ask him again.

Q. How much wood did you cut on the Elliott Association? A. In the year 1911.

Q. In the year 1911.

A. I cut one hundred and fifty-eight cords, or one hundred and thirty-eight, I couldn't swear which, I could tell you very well which, if I looked at my book, I haven't got that book with me though.

Q. Do you know if Mr. Kelly cut any wood on the Elliott Association in 1911? A. Yes, sir.

Q. Did Mr. Furlong cut any wood on the Elliott Association in 1911? A. Yes, sir.

Q. Do you know what became of that wood?

A. Yes, sir.

Q. Where did it go?

(Testimony of Robert Mann.)

A. Riley and Marston bought it.

Q. When?

A. Between October and November, 1911.

(Witness excused.) [49]

**[Testimony of David Mutchler, for Plaintiff.]**

DAVID MUTCHLER, for the plaintiff testified as follows:

Direct Examination by Mr. TAYLOR.

Q. State your name. A. David Mutchler.

Q. And your occupation? A. Freighter.

Q. You are a member of the firm of Mutchler Brothers? A. Yes.

Q. Were you in the freighting business in 1911 and 1912? A. Yes, sir.

Q. I will ask you if you ever hauled any wood from Boulder Creek? A. I did.

Q. I will ask you, after looking at the map, if you know where the Elliott Association is? A. I do.

Q. I will ask you if, in the winter of 1911 and 1912, you hauled any wood for Riley & Marston from Boulder Creek? A. Yes, sir.

Q. Do you know who cut that wood that you hauled? A. Yes, sir.

Q. Who cut it?

A. Well, there was about six or seven different men cut it.

Q. Did you haul any wood that Mr. Mann cut?

A. Yes, sir.

Q. Do you know how many cords you hauled of that wood?



(Testimony of David Mutchler.)

A. Why, I think about one hundred and forty-nine cords of his wood.

Q. Did you haul any wood that was cut by a Mr. Kelly?     A. I did.

Q. How many cords?

A. About one hundred and twenty-five, if I remember correctly.

Q. Did you haul any wood that was cut by Mr. Furlong?     A. Yes, sir.

Q. About how many cords?

A. One hundred and fourteen, if I remember correctly.

Q. I will ask you if you can refer that diagram, and show the locality from which you hauled that wood?

A. Well, I would judge it would be about three miles up Boulder, from the mouth, where I hauled the wood from, on the left limit of Boulder.

Q. Who else had wood up there that you hauled for Riley & Marston?

A. Why, a man by the name of Jones had wood that we hauled for him way up at the head of the creek—in fact, it was pretty near up on the Caribou side. [50]

Q. Do you know the total number of cords that you hauled from the vicinity of that ravine?

A. Well, I wouldn't know exactly, but I would judge there was probably two hundred to two hundred and fifty cords hauled out from the vicinity of that ravine.

(Testimony of David Mutchler.)

Q. Did you haul the Furlong wood from that vicinity?     A. Yes.

Q. And the wood cut by Kelly?     A. Yes.

Q. And the wood cut by Mann from that vicinity?

A. Yes, but Furlong's wood was cut from away up on top of the hill.

Q. Have you any idea how much was way up on top of the hill?

A. Well, I should judge half of his was way up, pretty well.

Q. You got paid for hauling that, did you?

A. Yes.

Q. How much did it cost to take that wood away from there?

A. It cost him four dollars and a quarter a cord.

Q. Would you be willing to put that wood back for that price?     A. I would not.

Q. What would be a fair value, a fair price, if you had to put that wood back again from the mouth of the creek upon that claim?

A. Oh, it would be worth probably twelve dollars a cord.

Cross-examination by Mr. RODEN.

Q. Now, Mr. Mutchler, do you know the lines of that so-called Elliott Association Claim?

A. No, sir, I don't.

Q. So you don't know whether Mann's wood was in the Elliott or not?     A. I don't.

Q. You say Jim Furlong's half of his wood was way up on top of the hill?

A. Yes, sir, it was way up on the mountain—in

(Testimony of David Mutchler.)

fact, it was above the timber line, a good lot of it.

Q. You say about half?      A. Yes, sir.

(Witness excused.)

**[Testimony of W. R. Day, for Plaintiff (Recalled).]**

W. R. DAY recalled, further testified on behalf of plaintiff as follows:

Direct Examination by Mr. TAYLOR.

Q. Did you ever see any notices to trespassers posted on there, on the Elliott Association?

A. I did.

Q. What year did you see them there?

A. In 1910—no, let me see, I don't know—well, it was the year that Mann and Furlong and Kelly were up there cutting. I don't know whether it was 1910 or 1911 now. [51]

Q. Did you see Mann, Furlong and Kelly cutting wood on the Elliott Association Claim?

A. I saw Furlong and Kelly cutting wood up there.

Cross-examination by Mr. RODEN.

Q. Now when was it the first time that you went on the Elliott Association?

A. I think it was in January, 1910?

Q. And who staked up there for you?

A. Joe Fox.

Q. And you furnished the names of Raap—and, was it Church?      A. Yes, Fred Church.

Q. Joe Fox. At the time you asked him to stake for you, did you have any understanding with him as to whether or not he should receive any interest in that claim he was staking?



(Testimony of W. R. Day.)

Mr. TAYLOR.—We object to that as incompetent, irrelevant and immaterial.

COURT.—The objection is overruled.

Mr. TAYLOR.—Exception.

A. Why, there was a general understanding, between Fox and myself that wherever he got a chance to stake me in, and any of those names I furnished him, he would do so, and that I would do the same with him and some of his names.

Q. Well, did you have any understanding that he was to have a half interest of what he staked for you?

A. No.

Q. Now you furnished him the name of John Raap? A. Yes.

Q. You said you had a power of attorney?

A. Yes, I had a power of attorney?

Q. That was in writing? A. Yes.

Q. Now did you have any understanding with John Raap as to securing an interest in any claims you might acquire for him?

A. Why, no, I had his power of attorney to stake the claims, and handle them from start to finish.

Q. That was a general power of attorney?

A. Yes.

Q. To do whatever you pleased? A. Yes.

Q. And you did do whatever you pleased, under this power of attorney? A. Yes. [52]

Q. You sold it finally? A. Yes.

Q. Now where is Church?

A. I understood that he was dead.

Q. He is dead? When did he die?

(Testimony of W. R. Day.)

A. I don't know, but there was a young fellow by the name of Fred Church committed suicide in Ruby last winter, and I'm pretty sure that is the same fellow. That's as near as I can tell.

Q. You had his power of attorney, too?

A. Yes.

Q. That was in writing, too?      A. Yes.

Q. A general power of attorney?

A. Yes, a general power of attorney.

Q. Now, did you have any understanding with Church to the effect that you were to have an interest in any mining claim that you might acquire for him under that power of attorney?

Mr. TAYLOR.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—Objection overruled.

Mr. TAYLOR.—We note an exception.

A. No—no agreement with Church at all—just simply had his general power of attorney. Of course he expected, if we struck anything rich, that of course he was to get it.

Q. And you weren't to get anything?

A. I made no agreement with him, or anything of the kind. I had a general power of attorney to handle all the property staked for him—sell it, or give it away, or anything.

Q. And there wasn't any agreement that you were to get anything for your services?

A. No agreement.

Q. Not a word said?

(Testimony of W. R. Day.)

A. He wanted me to stake for him.

Q. And you did stake for him?

A. I staked, I believe—I don't know whether I ever did or not—yes—I staked one.

Q. Well, I mean you caused his name to be placed on this particular claim?     A. Yes.

Q. And you sold it?     A. Yes.

Q. Now, in January, 1910, how long did you stay on there on that occasion?

A. Oh, just long enough to walk around it.

Q. Well, say five minutes?

A. Oh, longer than that, I presume. [53]

Q. Now, was there anyone on there at the time?

A. Anyone working on it?

Q. Yes.

A. No, I didn't see—not the first time I was there.

Q. After this, when did you go on the claim again?

A. Well, I tell you, I couldn't say exactly.

Q. Well, about?

A. Oh, some time during that summer I was up there again, probably July—I don't think I was up there before July.

Q. Well, how long did you stay that time?

A. Well, I didn't stay very long that time.

Q. Just took a little look around?

A. Taking a little look around, yes.

Q. Was there anyone on the claim that time?

A. No, I don't think so.

Q. That would now be about July, 1910?

A. Yes, about July, 1910.

Q. When did you next pay your visit to the claim?



(Testimony of W. R. Day.)

A. Well, it would be very shortly after that, some where along about the latter part of July, or first of August.

Q. Well, did you spend any time at that time?

A. Yes.

Q. Did you do anything on the claim?

A. Nothing on the claim—well, I didn't—do you mean prospecting?

Q. Yes, any work?

A. I didn't do any prospecting.

Q. What did you do?

A. Well, I started in cutting some logs over there.

Q. And how long did you continue cutting logs?

A. Oh, about a month, maybe longer.

Q. And you sold these logs, didn't you?

A. Yes,

Mr. TAYLOR.—We object to that as incompetent.

COURT.—Overruled. The witness has already answered the question.

Mr. TAYLOR.—We note an exception.

Q. Now this was about in August, 1910?

A. Some time along about that.

Q. Did you ever do any mining on that claim?

A. No.

Q. Did you ever do any panning on that claim?

A. Yes.

Q. When did you pan?

A. On that first visit there in July, that I spoke about. [54]

Q. That was in that drain that had been run off there by Tom Towsley and Elliott?

(Testimony of W. R. Day.)

A. Yes, that is the drain.

Q. Now, you yourself never did anything at all in the diggings?

A. No, I never did any digging there.

Q. Nor did you employ anyone else to do any for you, did you?

A. Well, of course, Towsley—Joe Fox and I were interested in getting Tom Towsley to go up there. Both of us had made the agreement to pay Towsley to go up there.

Q. Did you agree to pay him, or was he supposed to have an interest?

A. Well, he was supposed to have an interest, I believe.

Q. Fox gave him a half interest for sinking that drain up there?

A. Yes, I was to go in with him.

Q. Now, you say you found some gold on this claim? A. Yes.

Q. Now, when you were up there, did you ever stay there over night on that claim? A. Yes.

Q. As a matter of fact, there never was any mining done there after the time Towsley got through with that drain?

Mr. TAYLOR.—We object to that as incompetent, irrelevant and immaterial.

COURT.—The objection is overruled. Counsel has a right to show the condition of the ground.

A. Yes, there was work done there after that.

Q. When was it done? A. It was done in 1911.

Q. By whom?

(Testimony of W. R. Day.)

A. There were two different parties.

Redirect Examination by Mr. TAYLOR.

Q. Counsel asked you if you did any panning up there on that claim? A. Yes.

Q. Where did you pan—inside the boundaries of the claim? A. Yes, sure.

Q. What did you find?

A. I found colors of gold.

Q. How many pans did you pan?

A. I believe it was four.

Q. Did you find gold in every pan? A. Yes.

(Witness excused.) [55]

**[Testimony of J. F. Fox, for Plaintiff (Recalled)].**

J. F. FOX, recalled further testified on behalf of plaintiff, as follows:

Direct Examination by Mr. TAYLOR.

Q. You have testified as to being the locator of the Elliott Association? A. Yes, sir.

Q. You placed the names of the locators on the initial post, did you? A. Yes, sir.

Q. I will ask you if you are acquainted with one W. R. Day? A. I am.

Q. How long have you known him?

A. I have known him since the winter of 1909.

Q. He is the same person who has been before the Court and Jury this afternoon?

A. Yes, sir; he is the same.

Q. I will ask you if this W. R. Day is the same person that you intended to stake, and did stake in, on the Elliott Association? A. Yes, sir.

(Witness excused.)



**DEFENSE.****[Testimony of W. M. Bristol, for Defendant.]**

W. M. BRISTOL, for the defendant, testified as follows:

Direct Examination by Mr. RODEN.

Q. What is your business?

A. Well, at the present time, lumbering and milling.

Q. How long have you been in the Territory of Alaska?

A. I have been in here since ninety-seven.

Q. What business have you followed since ninety-seven?     A. Well, I followed mining first.

Q. How long did you follow mining?

A. Three years in Dawson.

Q. In what capacity?

A. Mined for myself, and worked lays.

Q. Ever been a prospector?

A. Prospected more or less ever since.

Q. Now, are you acquainted with a creek in this Precinct called Boulder Creek?

A. Yes, sir; I have lived there ever since the camp was struck.

Q. Ever since 1909, I suppose?

A. The spring of 1910.

Q. Now when did you first go on to Boulder Creek?

A. I went there in the spring of 1910. [56]

Q. Well, what time in the spring, would you say?

A. About the latter part of April.

Q. How did you happen to go there?

A. I went out with Mr. Towsley.

(Testimony of W. M. Bristol.)

Q. What is Mr. Towsley's first name?

A. Tom Towsley.

Q. Well, where did you go to?

A. We went to Boulder, to the Elliott Association, where he had been doing some prospecting and assessment work.

Q. What business relation exists between you and Tom Towsley?     A. We were partners.

Q. You say you went to the Elliott Association?

A. Yes.

Q. What did you do there?

A. He had been running an open cut there, and he had his camp outfit, and I went to help him take it down, and looked over the cut.

Q. I wish you would describe the cut.

A. Well, they had one run, a cut about a hundred and twenty-five feet, commencing at the bottom and running up—when I was there, it might have been about the length of my arm up above—and they had kind of ground sluiced with water.

Q. Did you do any panning around there?

A. Yes, sir.

Q. Who did the panning?

A. I did the panning. Mr. Towsley panned again.

Q. Where did you pan?

A. I panned all along this cut from about forty feet from the face, just above where they had the rock piled up.

Q. Now, what did you take—a kind of an average of the face, or what?

A. Well, I was trying to find a prospect of any-

(Testimony of W. M. Bristol.)

thing along in there.

Q. Well, did you find anything?

A. No, sir, I didn't.

Q. How many pans did you pan?

A. I panned three.

Q. Now you say Tom Towsley panned also?

A. He panned four—tried to show me there was something there.

Q. What did Tom get?

A. Well, he got two colors.

Q. In the four pans?

A. Yes, in the four pans. Two pans he didn't get anything.

Q. Now, was anyone else on the claim at the time?

A. No, there was no one else there.

Q. Did you do anything more around there?

A. I cruised around, cruised the timber there.

[57]

Q. How did you happen to do that?

A. Well, I was laying out that lower line from the initial post, to see how much ground there was there.

Q. At whose request did you do that?

A. Mr. Towsley's.

Q. Now, what was going on upon that claim at the time you were up there?

A. There wasn't anything.

Q. Nobody there? A. Nobody there.

Q. Did you ever go on that claim afterwards?

A. Yes, sir.

Q. When was that?

A. That was later—along towards the fall of 1910.



(Testimony of W. M. Bristol.)

Q. Anything going on then?

A. Yes, sir; they were cutting logs there.

Q. Who was cutting logs?      A. Mr. Day.

Q. That was the same Day that testified here?

A. Yes, sir.

Q. Were you ever on that property any more?

A. Yes, sir; I have been there two or three times since.

Q. Did you at any time see any mining operations carried on there?      A. No, sir.

Q. Now, you say you have had experience as a miner since ninety-seven?

A. Yes, I mined for three years steady.

Q. You are acquainted with the mining conditions of Otter Creek and Flat Creek?      A. Yes, sir.

Q. And all the creeks in this vicinity?

A. Yes, sir; I have prospected a good many of them here myself.

Q. I wish you would describe, as near as you can, the condition of the ground which is covered by this alleged Elliott Association, I mean, where is it located—in the valley and so forth?

A. Well, it is on the left limit of Boulder, and it is very high up—in fact, the upper side line—the greatest portion of it is above timber line—there is just once in a while a big scrub tree with the limbs clear to the ground. There is large boulders all around there.

Q. I wish you would state to the Court and Jury the material which you saw in this open cut.

A. Well, there was nothing but granite sand, like—

(Testimony of W. M. Bristol.)

just like you see on the hill there most anywhere. It is all over the divide there, most anywhere. [58]

Q. Now, suppose in a place such as you have described, a man would go and sink two or three shafts, and find in those shafts, or some of them, a few colors of gold; and suppose further, a man would sink a drain 125 feet long, and in that drain find the material which you have described—granite sand; and suppose, further, that he would pan there three or four or five pans, and get a few colors of gold in each pan, would that man, in your opinion as a miner, be justified in further expending time and money on a piece of property of that kind, with a reasonable expectation of developing a paying mine?

Mr. TAYLOR.—We object to the question. No proper foundation has been laid for such a question, in the first place; the defendant seeks to introduce evidence as to the character of the ground, which is decidedly objectionable, and which he has no right to do in this action. And furthermore, that it is irrelevant, incompetent and immaterial.

(After argument.)

COURT.—Objection overruled.

Mr. TAYLOR.—We note an exception.

Mr. RODEN.—(To WITNESS.)—You may answer that question.

A. No, sir.

**[Testimony of Charles Strandberg, for Defendant.]**

CHARLES STRANDBERG, for the defendant,  
testified as follows:

Direct Examination by Mr. RODEN.

Q. Your name is Charles Strandberg?      A. Yes.

Q. And where do you reside?

A. On Otter Creek, at the present time.

Q. How long have you been in this Precinct?

A. This is my third summer.

Q. You came down here when the strike was made?

A. Yes.

Q. What is your business?      A. Miner.

Q. How long have you followed that occupation?

A. Twelve years.

Q. Where?

A. Dawson, Fairbanks, and in this District.

Q. In what capacity have you mined?

A. Mostly carrying on my own mining.

Q. Been a prospector?

A. Operator most of the time.

Q. And you say you are operating on Otter Creek now?      A. Yes, sir.

Q. Now, are you acquainted with Boulder Creek and its location?

A. I am some acquainted with it.      [59]

Q. You have been up and down the creek, have you?      A. Yes.

Q. Are you acquainted with the premises that have been called here the Elliott Association Claim?

A. I was introduced to them last summer, once.

Q. About what time last summer?



(Testimony of Charles Strandberg.)

A. Why, some time in August, I believe—the latter part of August.

Q. Well, did you do anything around there?

A. I did some panning.

Q. I wish you would first of all describe the location of this so-called claim? I mean the ground that it covers.

A. The way the ground lays?

Q. Yes.

A. Well, as it was pointed out to me, there is a side-hill there with a little pup running through it—the way they showed me the boundaries.

Q. Who showed you the boundaries?

A. Mr. Robert Mann.

Q. That is the witness who testified here?

A. Yes.

Q. Now, describe the ground that he showed to you.

A. Well, it looked as if there had been a whole lot of timber on it at one time or another.

Q. Well, did you see any holes there, or drains, or anything like that?

A. I seen some shafts had been sunk in different places.

Q. How many of them did you see?

A. I believe it was three or four.

Q. Did you examine the material that was lying alongside the shafts?

A. I did.

Q. What kind of material was it?

A. Well, down in this here little pup there, there seemed to be some gravel, and other material.

Q. Did you pan any of that stuff?

A. I did.

(Testimony of Charles Strandberg.)

Q. Did you get anything?

A. I couldn't raise a color.

Q. How many pans did you pan?

A. I believe I panned two pans.

Q. Did you see anyone else pan?      A. Yes.

Q. Who?      A. John Ronan.

Q. How many pans did he pan?

A. Oh, two or three or four. [60]

Q. Did he get anything?

Mr. TAYLOR.—Just a moment. He hasn't shown that he saw him.

COURT.—(To Witness.) You saw the results of the panning?      A. I saw the results.

Q. (Mr. RODEN).—What did he get?

A. I didn't see him get a color.

Q. Did you see anyone else pan?

A. Henry Riley.

Q. How many pans did he pan?

A. Oh, two or three or four—I can't just recollect how many.

Q. From each place?      A. Yes.

Q. Do you know what his results were?

A. He didn't get any results, as far as gold was concerned.

Q. Did you see anyone else pan?

A. I don't recollect seeing anyone else pan.

Q. Now, when you panned, did you pan as a careful miner would pan?      A. Same as we always pan.

Q. Your purpose and your object was to find and save the gold, if you possibly could?      A. Yes, sir.

Q. And that seemed to be the object of the other

(Testimony of Charles Strandberg.)

men that were panning there?     A. It did.

Q. Now, then, suppose a piece of ground were located like that one described, and a man should go and sink three or four shafts on it, and in these few shafts found a few colors of gold; and suppose, further, that a drain was run some 125 feet long, and in this drain this man should pan, say five pans, and should find in these pans a few colors of gold; in your opinion, would such person, speaking as a miner, would such a person—who need not necessarily be a miner, but should be a prudent person—would such a person be justified in expending further time, means and money in developing such property, with a reasonable expectation of finding a mine—a paying mine?

A. There wasn't enough, in my opinion, to do that.

Q. Well, what would your answer be—Yes or no?

A. No. [61]

Cross-examination by Mr. TAYLOR.

Q. Who, did you say, pointed out the location to you?     A. Mr. Mann, I believe it was.

Q. Did you see any of the posts?

A. He showed me the blazed lines.

Mr. TAYLOR.—Just a moment. Before proceeding with the cross-examination, your Honor, I would move to strike out all the testimony of Mr. Strandberg, on the ground that it tends to show the character of the ground.

COURT.—The motion is denied.

Mr. TAYLOR.—We note an exception.

Q. Now, I would ask you if you know the dimen-



(Testimony of Charles Strandberg.)

sions of the Elliott Association.

A. Why, I don't know the exact dimensions of it.

Q. Supposing the claim to be—which it is—twenty-six hundred and forty feet square, you don't know whether you were in the middle of it, or on the side of it, as to its location?

A. Why, yes, I know we were pretty well all over it.

Q. You were all over it?      A. Yes.

Q. Where were you all over it? You were in that cut, weren't you?

A. Yes, we were down in that little draw.

Q. In the little draw?      A. Yes.

Q. How long did you say that cut was, that open cut?

A. I couldn't say how long that is. There had been some digging done there.

Q. As a miner, are you prepared to say that that claim is thoroughly prospected?

A. Oh, I wouldn't say that is thoroughly prospected.

Q. Is it not a fact in this country, gold can be found up on the hills, as well as down in the creeks?

A. Well it can be, yes.

Q. Is it not a fact, that it is?      A. Sometimes.

Q. Is it not a fact that on the head of Flat Creek, in this Precinct, that there is gold found up there on top of the hill, between the creeks?

A. It has been found at the head of Flat Creek.

Q. Is it not a fact that gold is found on the top of hills around in this country?      A. In places, yes.

(Testimony of Charles Strandberg.)

Q. Is it not so, on Flat Creek, at the head of Happy, and at the head of Chicken?

A. Yes, it is. [62]

Q. And at the head of Flat? A. It is.

Q. Did you try to prospect this claim up on the hill? A. We panned where shafts had been sunk.

Q. Did you get to bedrock on that claim?

A. I did see bedrock.

Q. Where? A. At those shafts.

Q. Where was this? A. On the hillside.

Q. How far up?

A. Oh, I can't tell the distance—toward the middle of the claim.

Q. Do you know you were on the Elliott Association at the time?

A. That's what I was told.

Q. You know you were told. You don't know of your own knowledge you were there? A. No.

Q. You say you panned two pans?

A. I panned three.

Q. And John Ronan?

A. Two or three, or four.

Q. And how many did Henry Riley pan?

A. About the same number.

Q. About four. Now I will ask you, if on a claim half a mile square twenty-six hundred and forty feet on each side, whether you would think twelve pans taken from that claim would constitute a proper testing of the claim for minerals, as a miner? Would you be satisfied to say there was no mineral there? A. I would have to sink more holes.

(Testimony of Charles Strandberg.)

Q. You would have to sink more holes before you would be satisfied?     A. Yes.

Q. So you are not prepared to say at this time that there is no gold on that Elliott Asociation?

A. I couldn't say that.

Redirect Examination by Mr. RODEN.

Q. But you do say that in your opinion, as an experienced miner, a person would not be justified in expending further time, means and money, with a reasonable expectation of developing a paying mine, under those circumstances and conditions?

Mr. TAYLOR.—I would like to know what he refers to.

COURT.—(To Witness.) Do you understand the question?

A. I believe I do. I don't believe there was sufficient to justify. [63]

**[Testimony of D. S. McDonald, for Defendant.]**

D. S. McDONALD, for the defendant, testified as follows:

Direct Examination by Mr. RODEN.

Q. What is your business?

A. Mining at the present time.

Q. How long have you followed the occupation of miner?     A. Since ninety-six.

Q. Where have you followed it?

A. I mined in South America—that is I worked for a mining company in South America. I come to Dawson in ninety-eight; to Fairbanks later.

Q. Where are you mining now?



(Testimony of D. S. McDonald.)

A. On Otter Creek.

Q. Are you acquainted with Boulder Creek?

A. Somewhat, yes.

Q. Do you know the premises that are known as the Elliott Association Claim?

A. I have been on that ground or claim that was pointed out to me as such.

Q. Who pointed it out to you?

A. If I remember rightly, Riley was one of the men.

Q. When was that?

A. And I had been over that ground before.

Q. Did you do anything on that ground?

A. I done some panning.

Q. When did you do that?

A. That was about the tenth of this month.

Q. How many pans did you pan?

A. Why, I panned several—seven or eight—I didn't keep track of them.

Q. Where did you get your materials to pan?

A. Off some dumps that was taken out of prospect shafts.

Q. Now, what kind of material was it that you panned? A. I would call it slide.

Q. Now, what was the result of your panning?

A. Why, I didn't get any gold.

Q. Did you get any other kind of mineral—precious mineral, I mean?

A. No—not that I could see, anyway.

Q. Now describe the location of that claim, as near as you can; I mean describe the ground it covers.

(Testimony of D. S. McDonald.)

A. Why, it is on the left limit of the upper end of Boulder Creek. Where those shafts were there was a low depression on the hill side that they called a pup, or small creek, where those shafts were that were sunk.

Q. Now was there any work going there, when you were up there?      A. No. [64]

Q. Now suppose that a man marked out a piece of ground like the Elliott Association Claim, and commenced to sink three or four shafts upon it, and in the sinking of those shafts, after having sunk them, panned and received a few colors of gold out of them; and suppose further, that the man would run a bedrock drain up and down stream some one hundred and twenty-five feet—or, not a bedrock drain, a ditch—and in this ditch or cut, should pan three or four or five pans, and should receive a few colors of gold as a result of this panning; in your opinion, as a miner, would such person be justified in expending further time, means and money on this property, with the expectation of developing it as a paying mine?

A. No, sir, he has nothing more than a prospector's chance, that you might have right here in the street.

Cross-examination by Mr. TAYLOR.

Q. What do you mean by a prospector's chance?

A. The same as any of us have when we get out in the hills—we have a chance to find gold.

Q. You say you were taken over that ground on Boulder Creek?      A. Yes, sir.

(Testimony of D. S. McDonald.)

Q. You say it was the Elliott Association?

A. I was told it was the Elliott Association. I didn't look up the records to find if it was the Elliott Association.

Q. You say you took your pannings off the dumps that were there?      A. Yes.

Q. How many dumps did you find?

A. I believe it was four.

Q. Whereabouts were they?

A. They were along in this depression on the hill-side, or creek as it might be called.

Q. How much ground did they cover?

A. I would judge it might be something about five hundred feet between the upper and lower.

Q. Now, as a miner and prospector, I would ask you if you would think that ground was prospected thoroughly, that twenty-six hundred and forty feet square?

A. No I wouldn't consider it thoroughly prospected.

Q. Do you know whether or not you prospected out of the hole that discovery was made from?

A. No, sir, I do not.

(Witness excused.)

**[Testimony of Thomas McEwan, for Defendant.]**

THOMAS McEWAN, for the defendant, testified as follows:

Direct Examination by Mr. RODEN.

Q. What is your business?      A. Mining.

Q. How long have you followed the occupation of



(Testimony of Thomas McEwan.)

a miner?      A. Fifteen years. [65]

Q. Where?

A. Dawson, Fairbanks, Innoko and this camp.

Q. How long have you followed it in this Precinct here?      A. Three years.

Q. Are you mining at the present time?

A. Yes, sir.

Q. Whereabouts are you mining?      A. Otter.

Q. Are you acquainted with the premises known as the Boulder Creek?      A. Yes.

Q. How long have you known that creek?

A. How long?

Q. Yes.

A. Well, it is three years since I have been on Boulder first.

Q. You are generally acquainted with the conditions in this Precinct, are you not?      A. I think so.

Q. Have you ever been up on what is known as the Elliott Association on Boulder Creek?

A. Yes, sir.

Q. When were you up there?

A. Oh, I have been there a good many times. I have been there two years ago last winter, I guess, was the first time I was up there, and a year ago last winter.

Q. Was anyone on the claim when you got there two years ago?      A. I never seen anyone.

Q. Well, have you ever done any panning there yourself?      A. Yes, sir.

Q. When was that?

A. About five or six days ago.

(Testimony of Thomas McEwan.)

Q. Now I wish you would describe to the Court and Jury what you did do?

A. Well, I see three prospect holes, and I panned four pans from one, and five pans from another of the holes. I panned two holes, or where two holes had been sunk.

Q. Now what kind of material did you pan?

A. It was—in one hole there was what I supposed to be bedrock, slide and a little gravel.

Q. Now what did you get as a result of your panning from that hole?      A. In gold?

Q. Yes.      A. I didn't get any gold at all.

Q. Did you get any other precious minerals?

A. Not that I could tell.

Q. What about the other hole?

A. I didn't get a color in any hole. [66]

Q. What kind of material did you pan in the second hole?

A. It was principally slide rock. Now there might be a piece of wash rock. There was no good gravel in any of them.

Q. I wish you would describe the location of this ground that you panned.      A. Of the claim?

Q. Yes.

A. Well, it is on the left limit of Boulder Creek, on a pup—some people call it a fork of Boulder Creek. It comes in on the left limit. I don't know whether it has a name or not.

Q. Now suppose a man would stake a piece of ground like the one you have described, and should sink three or four shafts on it, and in sinking these

(Testimony of Thomas McEwan.)

shafts, and on reaching bedrock, should find a few pieces of gold; and suppose further, that a man should run a ditch some hundred and twenty-five feet in length through the claim, and out of such ditch pan three or four or five pans, and receive as a result thereof a few colors of gold; in your opinion, as a miner, would such person be justified in further expending time, means and money in developing such property, with a reasonable expectation of developing a paying mine?     A. No, sir.

Cross-examination by Mr. TAYLOR.

Q. You don't know whether at the time you were panning, that these holes were where they made discovery on that claim?

A. Yes I know. I am sure I know, yes. I know I was on this disputed ground.

Q. That might be too. But did you know you were at the holes on that ground where Mr. Fox made discovery?     A. Oh, no, I don't know that.

Q. You might have been at altogether a different place?     A. I was at two holes.

Mr. TAYLOR.—Plaintiff moves to strike all the testimony of this witness, on the ground that it is presented for the purpose of establishing the character of the ground.

COURT.—The motion is denied.

Mr. TAYLOR.—We note an exception.

(Witness excused.)



**[Testimony of M. D. McCarty, for Defendant.]**

M. D. McCARTY, for the defendant, testified as follows:

Direct Examination by Mr. RODEN.

Q. What is your business?     A. I am a miner.

Q. How long have you followed the business of mining?     A. Well, about twelve years.

Q. Where?

A. In Dawson, Fairbanks, Innoko and Iditarod.

[67]

Q. Are you acquainted with the creek known as Boulder Creek?     A. Yes, sir, I cut wood there.

Q. Now, when did you first go on Boulder Creek?

A. Well, it was in the spring of 1911.

Q. Did you ever do any mining or prospecting on Boulder Creek?     A. No, sir, I never did.

Q. Now have you got any mining interests on Boulder Creek?

A. Well, I had a fourth interest in an association there.

Q. Where was that?

A. That was up at the head of Boulder.

Q. Do you know the claim known as the Elliott?

A. Yes. It was above the Elliott.

Q. Did it adjoin the Elliott?

A. Yes, it adjoined the Elliott.

Q. When did you locate that claim?

A. Well, it was in December, 1910, I believe.

Q. Did you ever do any work on that claim?

A. I helped to sink one hole there. I don't call that any prospecting, though. We were there in the

(Testimony of M. D. McCarty.)

spring of the year, waiting for the snow to go.

Q. How deep was that hole?      A. Twelve feet.

Q. To bedrock?      A. Yes.

Q. What kind of material did you go through?

A. We went through slide.

Q. Where was that hole with reference to the line of the Elliott Association that adjoins your claim?

A. Well, according to my line it was about five hundred feet.

Q. From it?

A. From the line of my claim; but according to theirs, to the Elliott Association Claim, it was only about a hundred and fifty feet.

Q. Did you find anything in that hole?

A. Not a thing.

Q. You panned, of course?      A. Oh, sure.

Q. Now are you acquainted with the ground covered by the Elliott Association?

A. I have been over it a hundred times, I suppose, in the year and a half.

Q. Now suppose a man would locate or stake a piece of ground like the Elliott Association, and sink three or four shafts, and find a few colors in them and should later on run a drain or ditch through the claim, about one hundred and twenty-five feet long, and say, pan three or four or five pans in which he should also find a few colors of gold; do you think such a man would be justified in putting in [68] further time or money, with the expectation of developing a paying mine?

A. No, I don't think two or three, or four or five

(Testimony of M. D. McCarty.)

colors will develop a claim. I don't think it is even a prospect.

Mr. TAYLOR.—We move to strike out the testimony of Mr. McCarty, on the ground that it is tending to prove the character of the ground.

COURT.—The motion is denied.

Mr. TAYLOR.—We note an exception.

Cross-examination by Mr. TAYLOR.

Q. You were never on the Elliott Association prospecting, were you?

A. No, I never was prospecting there, I prospected above, on my own ground.

Q. You don't know whether there is any mineral or not on the Elliott?      A. No, I don't.

(Witness excused.)

**[Testimony of Robert Mann, for Defendant  
(Recalled).]**

ROBERT MANN, recalled for the defendant, testified as follows:

Direct Examination by Mr. RODEN.

Q. Now, while you were cutting the wood that you testified to, this afternoon, where were you living?

A. On a portion of this Elliott Association.

Q. Now during the time you lived on there, was any mining being carried on?

Mr. TAYLOR.—Objected to as irrelevant, incompetent and immaterial.

COURT.—The objection is overruled.

Mr. TAYLOR.—We note an exception.

Q. And you say you went on there some time in



(Testimony of Robert Mann.)

March, 1911?      A. Yes.

Q. And you are on there today, are you?

A. No, sir, not on the Elliott.

Q. When did you quit—oh, yes, I remember—you quit in September, 1911. Now are you acquainted with the lines of the Elliott Association?

A. Well, I am acquainted with the lines as they were shown to me.

Q. By whom?

A. But you can't read the writing on the stakes. I am acquainted with the lines as described to me by Mr. Blais.

Q. Well, have you ever followed around those lines?      A. Oh, yes.

Q. And what is the width or the length?

A. Well, it is a pretty big claim. I never measured it.

Q. Now did you ever take anyone up there to do any panning?

A. I was up there with Mr. Strandberg and Mr. Riley, and Mr. Ronan; and this other Mr. Riley—Mr. Henry Riley, and Mr. George Riley. [69]

Q. That was last year?      A. Yes, sir, 1912.

Q. Did you notice what they did?

A. Yes, sir, I showed them the holes that were sunk on this claim.

Q. Now did you ever do any panning around there?      A. Yes, sir, I did.

Q. Where?

A. Well, I done some panning on this open cut, or bedrock drain, that Mr. Fox said he put in.

(Testimony of Robert Mann.)

Q. When did you do that?      A. Last fall.

Q. How many pans did you pan?

A. Oh I panned several all along the cut—must have panned a dozen or fifteen.

Q. Did you get anything?

A. Never got a color.

Q. Now you are well acquainted with all Boulder Creek, are you?      A. Yes.

Q. Is there any mining being carried on there now?      A. No, sir.

Q. Has any paystreak ever been developed on the creek anywhere?

A. Not that I ever heard tell of.

Q. How long have you been engaged in the mining business?

A. I started in first—my first experience was in 1883, in the northern part of California.

Q. And have you been following the occupation of a miner and prospector since that time?

A. Off and on ever since.

Q. And how long have you been in Alaska?

A. I came to Dawson in ninety-seven.

Q. And then to Alaska?      A. To Nome in 1900.

Q. And when did you come here?

A. Three years ago.

Q. Now I wish you would describe the location of this Elliott Claim; I mean where it is with reference to the valley.

A. Well, I will have to go off the map, show you there, as I understand it.

Q. Well, go ahead.

(Testimony of Robert Mann.)

A. Well, it has always been described to me as a creek going up here (indicating on diagram) and this pup what took in this part of it.

Q. Well, where is it with reference to the side hill?

A. Well, there is two forks run off like that, and the claim takes in this fork. [70]

Q. Now suppose a man should locate a piece of ground like that, and should sink three or four shafts, and in those shafts should find a few colors of gold; and suppose further, a man would run a ditch a hundred and twenty-five feet in length, as this ditch was run on this claim, and should find as a result of panning three or four, or five pans, a few colors of gold; in your opinion as a miner, would such a person be justified in further developing that ground,—or would such a person be justified in further expending his time, means and money in further developing that ground with a reasonable expectation of developing a paying mine? A. No, sir.

Cross-examination by Mr. TAYLOR.

Q. You say you showed these several parties the holes that were on the claim? A. Yes.

Q. Who put these holes there, do you know?

A. No, sir, I don't. I was told—

Q. Never mind what you were told. You don't know who put those holes there? A. No.

Q. Do you know whether any of those holes was the place where Mr. Fox got colors from?

A. I don't know.

Mr. TAYLOR.—We move to strike out all the evidence of Mr. Mann, for the reason that it is incom-



(Testimony of Robert Mann.)

petent, irrelevant and immaterial, and further, that it is tending to establish the character of the ground.

COURT.—The motion is denied.

Mr. TAYLOR.—We note an exception.

(Witness excused.)

**[Testimony of J. E. Riley, in His Own Behalf.]**

J. E. RILEY, defendant in his own behalf, testified as follows:

Direct Examination by Mr. RODEN.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. And you and Mr. Marston are partners in the mining business?     A. We are.

Q. How long have you been following the occupation of a miner?

A. About twenty-five or twenty-six years.

Q. Where?

A. All over Alaska, and different places—Dawson and California.

Q. And how long have you been in this section of Alaska?     A. Four years this coming fall.

Q. Are you acquainted with Boulder Creek, in this precinct?     A. I am. [71]

Q. When did you first become acquainted with that creek?

A. The first time I ever went over the creeks, I went down the trail and walked down Boulder.

Q. Have you been over the ground that is claimed as the Elliott Association?     A. Yes, sir.

Q. Have you ever been on there?     A. I have.

Q. When was that?

(Testimony of J. E. Riley.)

A. I have been on there several times.

Q. When were you on there the first time?

A. On there the first time the winter of 1909 and 1910.

Q. And did you do anything on that claim at that time?     A. No, sir.

Q. Was there anybody on it?

A. No, sir, not that I seen.

Q. When were you on there again?

A. If I remember right, in 1911.

Q. What time in 1911?

A. In the fall of the year.

Q. Did you do anything on the claim at the time?

A. No, sir.

Q. Did you ever do any panning on that claim?

A. I saw some panning, yes.

Q. You saw panning?     A. Yes.

Q. Whom did you see?

A. Ronan, and Henry Riley and Strandberg.

Q. You saw them in 1911?     A. 1912.

Q. Last year?     A. Yes.

Q. You say you saw them panning?     A. I did.

Q. Where did they get the material to pan from?

A. Off the dumps that was taken out of these holes.

Q. Do you remember how many dumps there were?     A. Four, I think.

Q. Do you know the results of their panning?

A. Yes, sir.

Q. Now what did they get?

Mr. TAYLOR.—Objected to as incompetent, irrelevant and immaterial, and not binding upon the

(Testimony of J. E. Riley.)

plaintiff in this action.

COURT.—(To witness.) You are testifying to what you saw there? A. Yes, sir. [72]

COURT.—The objection is overruled.

Mr. TAYLOR.—We note an exception.

A. They didn't get anything, that I could see in the pans.

Q. I wish you would describe to the Court and jury the location of this so-called claim.

A. Oh, the location is near the head of Boulder Creek, near where it forks, and practically the most of the claim is between the two forks—a kind of a side hill, low grade.

Q. Now suppose a man should locate a piece of ground like that, and should sink three or four shafts, and should pan those shafts and find a few colors of gold; and suppose further, that he would run a ditch a hundred and twenty-five feet, and in that ditch or cut should find also, a few colors of gold, as a result of panning—say four or five pans; now, in your opinion as a miner, would such person be justified in expending further time, means and money in developing such property, with a reasonable expectation of developing a paying mine? A. No, sir.

Cross-examination by Mr. TAYLOR.

Q. This claim is located on a bench, is it?

A. Partially, yes, sir.

Q. You have known bench claims to contain pay before, haven't you? A. You bet I have.

Q. The holes you saw these pannings taken out from, did they go down the holes, or were they off the



(Testimony of J. E. Riley.)

dump?      A. Off the dump.

Q. Do you know who dug those holes?

A. No, sir, I don't.

Q. You don't know whether they were the same holes that discovery was made from?

A. No, sir, I don't know.

Mr. TAYLOR.—We make the same objection to Mr. Riley's testimony that has been offered to the rest of these witnesses.

COURT.—The objection is overruled.

Mr. TAYLOR.—Exception.

(Witness excused.)

Mr. TAYLOR.—Plaintiff rests.

**[Motion for Directed Verdict in Favor of  
Defendants, Etc.]**

Mr. RODEN.—Now, may it please your Honor, we make a motion at this time that the Court instruct the jury to return a verdict in favor of the defendants in this case, for the following reasons: First: That the title and ownership of the alleged placer mining claim, and the wood cut therefrom, is directly in issue in this case, and the testimony does not show that the plaintiff, at the time of the alleged trespass, had either a general or special property therein, or in any part thereof; Second: The testimony does not show that the land described in the complaint herein, and on which the wood was cut was distinctly mineral in character, or was more valuable for the mineral therein contained than for the timber growing thereon: [73] Third: the testimony shows that at the time of the alleged tres-

pass, and at the time of the cutting of the wood, the land alleged to have been, trespassed upon and from which the wood is alleged to have been taken, was public land of the United States; Fourth: Because all the testimony in this action shows that the premises described in the complaint, and the wood cut therefrom, was the property of the United States, and that plaintiff had neither the right nor title thereto, nor the possession thereof, nor the right to the possession thereof; Fifth: That all the testimony introduced in this case shows that the trespass alleged to have been committed, if committed at all, was committed prior to the first day of October, 1911, and prior to the time the plaintiff herein acquired any title to the premises described in the complaint, and that no trespass was committed; and there is no testimony showing that any trespass was committed, after this plaintiff became the owner of the alleged mining claim described in the complaint, or became the owner of the wood cut therefrom, or acquired the right of possession therein, or the possession thereof; Sixth: That all the testimony in this case shows that the trespass, if any was committed, was not committed by these defendants, nor by their servants, agents or employees, or by any person under their control, or under the control of either of them; nor is there any testimony showing that these defendants, or either of them, advised connived in, procured or incited any person to commit such trespass, if any was committed.

Now these are the grounds, may it please Your Honor—and perhaps the further one; Seventh: that



the testimony does not show that either plaintiff or his grantors made a valid mining location upon the premises, or embracing the premises described in the complaint herein; and there is no testimony showing that the plaintiff, or his grantors, or any of them, or any person for them, ever marked the boundaries of the alleged mining claim so that the same could be readily traced; that they never made a discovery of gold, or other precious minerals within the exterior boundaries of the premises described in the complaint, such as is required by law; that they never filed any notices of location, or made any notice of location whatsoever, either upon the said premises, or anywhere; Eighth: That the testimony shows that the annual assessment work required to be done under the mining laws of the United States, was not performed during the year 1911, and that by reason thereof, the said mining claim described in the complaint, if it ever existed, lapsed, became forfeited, and again became a portion of the unappropriated public domain of the United States.

Now these are the reasons, may it please Your Honor, upon which we ask the Court to instruct the Jury to return a verdict in favor of the defendant.

(After argument by counsel for both parties.)

By the COURT.—It seems to me that the evidence has shown that when the trespass was committed, that the wood was all cut, not prior to the date alleged in the complaint, but prior to the time of the conveyance to the plaintiff and that it was there on the ground, not requiring anything further to be done to it; and I am not sure that the wood



passed to the plaintiff, by any means, under that conveyance.

With regard to the points upon which the defendant bases his motion: there is no title shown to the land or wood, and it seems to me it is incumbent upon the plaintiff, having alleged that he was the owner, to show something in the nature of ownership, at least. It might be satisfied by showing actual possession. A presumption of ownership follows from possession, which is averred. In mere actions of straight trespass, it is perhaps sufficient to show possession. But the nature of the title plaintiff has alleged here, is that of ownership of a mining claim.

[74]

The objection that the evidence does not show that this was land of mineral character, that it was more valuable for wood, for the timber on it, I think is not well taken. It is only in so far as a valid discovery must be shown that that matter is involved in an action of this kind, or in any action between different parties outside of the Land Office, over a mining claim. It is necessary, of course, to show a valid location; that is, to show such a discovery as is required by law, which is such a discovery as will warrant an ordinary prudent man, not necessarily a miner, in expending his time, money and labor, with the reasonable expectation of developing a paying mine upon the property; and when that is satisfied it may be also even more valuable for timber land than for mining, but if the location is made in good faith, that is sufficient. The title of the locator is not defeated, because it happens to have a valuable

growth of timber upon it. If the purpose were simply to acquire possession of the timber by means of a pretended location, then it is a different matter; but if the location is made in good faith, as a mining claim, that is all that is required. And certainly, in any proceeding outside of the Land Office this would be sufficient. As to the question of whether or not such a discovery was made, I think that is a question of fact for the jury to determine. There was some testimony on the part of the defendant to that effect, and as long as there was a conflict of evidence, it would not be for the Court to say on which side the weight of the evidence was, but a question of fact for the determination of the jury. On the question of marking of the boundaries, while I think the evidence was not very definite—it was very indefinite as to the nature of the stakes that were put up, and the character of the markings—still, I think there was some evidence that there had been such a marking of the boundaries on the ground, whereby the limits of the claim could be traced. They seem to have been traced by a number of different parties. Whether or not it was sufficient to comply with the law, I think is also a question of fact to be decided by the jury.

And while, undoubtedly, under the Waskey Act, it has been construed by our Circuit Court of Appeals that it is absolutely necessary that the assessment work be done during the year, and if it is not done during the year in which it is required, the claim lapses without any entry thereafter—It was so held in the case of Thatcher against Brown—of



course it is a decision which the Courts in this District must enforce, but I do not understand that this changed the nature of the pleadings in an action of this kind. It always has been the rule that to take advantage of forfeiture, it must be alleged in the pleadings; it must be made one of the issues in the case, by the pleadings.

Mr. RODEN.—I don't know how it would be as far as the pleadings were concerned, Your Honor. There has no case come up since that decision.

After further argument,

By the COURT.—(Continuing.) If it conclusively appeared that plaintiff had no title at the time the trespass was committed, of course there would be no damage committed. This is an action, as I view it, not to determine conflicting locations. It is an action to recover treble damages, under the Statutes, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover—that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff. The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damages. And while this question has not been raised [75] in this case, as to the measure of damages, in an action of this kind if it were sub-



mitted to the jury it would be necessary to consider what is the plaintiff's measure of damage for wood taken off the mining claim. He has not an absolute fee simple title. He simply has the right to his mine upon the ground, so long as he complies with the Statutes of the United States. He has the right to use the wood on the ground for mining purposes, but he has not the right to take the wood from the ground and sell it elsewhere. The Government can still restrain him from doing that. Now the view I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood that would necessarily be the measure of damages. There seem to be several different rules laid down, by which damages are measured, where wood or grain is taken from land—timber particularly. It may be measured by the value of the wood upon the mining claim; or it may be measured by the value at the place where it was converted by the other party—In this case I suppose it would be on Otter Creek, if that rule were applied—or it may be the difference between the value of the land with the wood upon it, and the value with the wood gone. And I think the latter rule would be the one to apply in a case of this kind, because the owner of a mining claim has no right to sell the wood. He has only the right to use it upon the ground; and the damage so sustained would be the difference between the mining claim with the wood upon it, and the value of the claim if the wood were gone. There has been no testimony whatever in this case as to the value of

the mining claim either before or after the wood was gone.

Mr. TAYLOR.—We have shown, if the Court please, what it would cost to put that wood back.

By the COURT.—(Continuing.) Yes, but you have not shown that the claim would be of any value whatever, if the wood were put back.

Giving the fullest effect to the testimony of the plaintiff, as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and markings of boundaries, I cannot see, if it were submitted to the jury, that they would be justified in finding anything more than nominal damages. And, taking that view of the case, I think it is not worth while to submit it to the jury. Defendant's motion for a directed verdict will be granted.

Mr. TAYLOR.—To which plaintiff excepts, may the Court please.

By the COURT.—Gentlemen of the Jury, you will select a foreman, and return a verdict finding for the defendants. You may do so without retiring.

(Verdict returned as instructed.)

By the COURT.—I might say, further, in regard to one point in this case, that the testimony did not show that any trespass had been committed by the defendants themselves, or by anyone acting for them. If it were an action strictly of conversion, the evidence would be undoubtedly, sufficient to hold them responsible. I think the Government has, in several cases, recovered from parties who have taken

timber or cut wood under circumstances similar to these.

Mr. RODEN.—Yes, your Honor. [76]

By the COURT.—And any other owner could, also under similar circumstances. [77]

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**[Order Approving etc., Bill of Exceptions.]**

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY & M. H. MARSTON, Copartners, Do-  
ing Business as RILEY & MARSTON,  
Defendants.

Be it remembered that on this 20th day of July, A. D. 1914, the above-named plaintiff presented his Bill of Exceptions to the above-entitled Court for allowance and Settlement, which said Bill of Exceptions has been duly filed within the time allowed by order of said Court; and it appearing to the Court from an examination of said Bill of Exceptions and upon the stipulation of the respective Counsel for the parties herein, that the same contains all the material evidence, testimony and exhibits introduced upon the trial of said cause and the proceedings had thereon not of record, and is in all respects true and correct:

Now, therefore, on motion of the plaintiff, it is



hereby ordered and adjudged that the foregoing typewritten pages from 1 to 50, inclusive, be, and the same is hereby approved, allowed and settled as the Bill of Exceptions of the above-entitled cause. That whenever an exception was noted by either of the parties hereto, to any ruling of the Court that the same was then and there allowed by the Court.

Dated Iditarod, Alaska, July 20, 1914.

F. E. FULLER,  
District Judge.

Entered in Court Journal No. 2, page 76, at Iditarod, Alaska. [78]

**[Stipulation re Transcript of Record.]**

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY and MARSTON,

IT IS HEREBY STIPULATED AND AGREED by and between the respective Counsel for the parties hereto, that the Clerk of the Court shall cause to be corrected all the clerical errors in the foregoing fifty-one (51) typewritten sheets, and that when so corrected, they shall constitute the testimony and decision of the Court.

That the said Clerk shall cause this Transcript and

Bill of Exceptions to be printed in a correct, uniform, printers style, not following copy literally in all details, and omitting the title of the Court and cause in all places except the beginning.

That the Transcript and Bill of Exceptions herein shall consist of the Complaint; Answer; Demurrer to Answer; Order Overruling Demurrer and Permitting Amended Answer; Affidavit of G. W. Albrecht; Motion for Default; Order Denying Motion for Default; Reply; Plaintiff's Exhibits "A," "B," "C," "D"; Verdict; Judgment; Testimony; Petition for Writ of Error; Assignment of Errors; Order Allowing Writ of Error and this Stipulation;

It is also further stipulated and agreed that the time for filing this Bill of Exceptions has been, by proper order of Court, duly extended to the date hereof.

Dated July 20, 1914.

CHAS. E. TAYLOR,  
Attorney for Plaintiff,  
HENRY RODEN,  
Attorney for Defendants.

Filed in the District Court. Territory of Alaska,  
4th Div. Jul. 20, 1914. Angus McBride, Clerk.  
By Geo. W. Albrecht, Deputy. [79]

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY and MARSTON,  
Defendants.

**Petition for Writ of Error.**

George W. Albrecht, the plaintiff in the above-entitled action, feeling himself aggrieved by the proceedings had in said action and by the Verdict and Judgment therein made and entered by the above-entitled Court on the 16th day of July, A. D. 1913, comes now by his attorney, Charles E. Taylor, and petitions the Court for an order allowing the said plaintiff to prosecute a Writ of Error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, holding terms at the City of San Francisco in the State of California, under and according to the laws of the United States in that behalf made and provided; Also that an order be made fixing the amount of Cost Bond which the said plaintiff shall furnish upon such Writ of Error.

Dated at Iditarod, Alaska, May 28, 1914.

CHAS. E. TAYLOR,  
Attorney for Plaintiff,



Filed in the District Court. Territory of Alaska,  
4th Div. Jul. 20, 1914. Angus McBride, Clerk.  
By Geo. W. Albrecht, Deputy. [80]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY & MARSTON,  
Defendants.

**Order Allowing Writ of Error [and Fixing Amount  
of Bond].**

Upon motion of Charles E. Taylor, attorney for  
George W. Albrecht, the above-named plaintiff, and  
the filing of petition for Writ of Error and Assign-  
ment of Error;

It is hereby Ordered that a Writ of Error be, and  
the same is hereby allowed to be reviewed in the  
United States Circuit Court of Appeals for the Ninth  
Circuit, holding terms at San Francisco, California;  
That the amount of the bond to be given by the plain-  
tiff on said Writ of Error be, and the same is hereby  
fixed at the sum of \$250.00.

Dated this 22d day of July, A. D. 1914.

F. E. FULLER,  
District Judge.

Entered in Court Journal No. 2, page 79, at Iditarod, Alaska.

Filed in the District Court. Territory of Alaska, 4th Div., Jul. 22, 1914. Angus McBride, Clerk. By Geo. W. Albrecht, Deputy. [81]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY and MARSTON,  
Defendants.

**Assignment of Errors.**

Comes now the above-named plaintiff, George W. Albrecht, the plaintiff in error and presents and files this, his assignment of Errors in the proceedings and trial of the above-entitled action in the above-named court, which said Assignment of Errors the plaintiff in error intends to and does rely upon in the Writ of Error herein granted, to be prosecuted in the United States Circuit Court of Appeals for the Ninth Circuit, holding terms at Seattle, Washington.

1.

The Court erred in overruling plaintiff's demurrer to the affirmative answers and defenses of the defendant, as per order of said Court made and entered on September 12, 1912, for the reason that the said

affirmative answers do not state facts sufficient to constitute a defense to the complaint.

## 2.

The Court erred in denying plaintiff's motion, filed on June 27, 1913, for an order of default and judgment against the defendants, for the reason that the said defendants, in open Court, on the 12th day of September, 1912, applied for and obtained permission by order of said Court on said day, to file [82] forthwith an amended answer in said cause; that thereafter, they wholly failed and neglected to file such amended answer.

## 3.

The Court erred in requiring plaintiff to prove the original location of a placer mining claim by plaintiff's predecessors in interest, to wit: Upon the examination of the plaintiff, he was asked:

Q. You state in your complaint that you are the owner of that claim; by virtue of what instrument or possession do you own it?      A. By a deed.

Q. Have you that deed?

Mr. RODEN.—We object to that question, because it has not been shown that any such claim as the Elliott Association claim exists.

The COURT.—I think you had better proceed in the regular way, and establish your location first, Mr. Taylor.

## 4.

The Court erred in granting plaintiff's motion for a directed verdict at the conclusion of the testimony.

## 5.

The Court erred in holding and deciding that no



title to wood passed under the conveyance to the plaintiff because the said wood was cut before the date of the said conveyance, said decision being as follows:

“By the COURT.—It seems to me that the evidence has shown that when the trespass was committed, that the wood was all cut, not prior to the date alleged in the complaint, but prior to the time of the conveyance to the plaintiff, and that it was there on the ground, not requiring anything further to be done to it, and I am not sure that the wood passed to the plaintiff, by any means, under that conveyance.”

## 6.

The Court erred in further holding and deciding as follows: [83]

“There is no title shown to the land or wood and it seems to me it is incumbent upon the plaintiff, having alleged that he was the owner, to show something in the nature of ownership at least.”

## 7.

The Court erred in further deciding as follows:

“It is necessary, of course, to show a valid location; that is, to show such a discovery as is required by law.”

## 8.

The Court erred in further deciding as follows:

“If it conclusively appeared that plaintiff had no title at the time the trespass was committed, of course, there would be no damage.”

## 9.

The Court erred in further deciding as follows:

“It is an action to recover treble damages, under the Statute, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover; that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff.”

## 10.

The Court erred in further deciding as follows:

“The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damage.”

[84]

## 11.

The Court erred in further deciding as follows:

“Now, the view that I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood that would necessarily be the measure of damages.”

## 12.

The Court erred in further finding and deciding as follows:

“There has been no testimony whatever in this case as to the value of the mining claim, either before or after the wood was gone.”

Mr. TAYLOR.—We have shown, if the Court please, what it would cost to put that wood back.

The COURT.—Yes, but you have not shown that the claim would be of any value whatever, if the wood were put back.

## 13.

The Court erred in further deciding as follows:

“Giving the fullest effect to the testimony of the plaintiff as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and marking of boundaries, I cannot see, if it were submitted to the jury, and that they would be justified in finding anything more than nominal damages, and taking that view of the case, I think it is not worth while to submit it to the jury.

## 14.

The Court erred in further deciding as follows:

“I might say, further, in regard to one point in this case, that the testimony did not show that any trespass had been committed by the defendant, or by anyone acting for them. [85]

## 15.

The Court erred in failing and refusing to submit the case to the Jury at the conclusion of the testimony.

To all of which findings and decisions of the said Court, the plaintiff duly excepted, and said exceptions were allowed.

## 16.

The Court erred in giving and entering judgment in favor of the said defendants and against the plaintiff herein, that the plaintiff take nothing and that



defendant recover their costs and disbursements herein, which said judgment was in accordance with said directed verdict.

Wherefore, the said George W. Albrecht, plaintiff in error, prays, that said judgment be reversed and set aside and, judgment be given to the said plaintiff in error for the amount prayed for in his complaint herein.

CHAS. E. TAYLOR,

Attorney for Plaintiff in Error, George W. Albrecht.

Filed in the District Court, Territory of Alaska, 4th Div. Jul. 20, 1914. Angus McBride, Clerk. By Geo. W. Albrecht, Deputy. [86]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY and MARSTON,  
Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, George W. Albrecht, as principal, and Samuel Applebaum and ———, as sureties, are held and firmly bound unto J. E. Riley and M. H. Marston, copartners, doing business as Riley and

Marston, in the full and just sum of two hundred fifty dollars (\$250), to be paid to the said Riley and Marston, their executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of July, A. D. 1914.

Whereas the above named George W. Albrecht has sued out a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled action, and a citation directed to the above named J. E. Riley and M. H. Marston, copartners, is about to be issued, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California: [87]

Now, the condition of the above obligation is such that if the said George W. Albrecht shall prosecute his Writ of Error to effect and shall answer all damages and costs if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

GEO. W. ALBRECHT. [Seal]

SAM'L APPLEBAUM. [Seal]

J. J. SMITH. [Seal]

United States of America,  
Territory of Alaska,  
Fourth Division,—ss.

Samuel Applebaum and Jay J. Smith, the sureties named in the foregoing bond, being first duly sworn

each for himself, says: That he is a resident within the Territory of Alaska. That he is not an Attorney or Counsellor at Law, United States Marshal or other officer of any Court. That he is worth the sum of two hundred and fifty dollars over and above all just debts and liabilities exclusive of property exempt from execution.

SAM'L APPLEBAUM.

J. J. SMITH.

Subscribed and sworn to before me this 28th day of July, 1914.

[Seal]

CHAS. E. TAYLOR,

Notary Public in and for Alaska.

My commission expires Dec. 24, 1915.

The foregoing Bond taken and approved this 28th day of July, A. D. 1914.

E. FULLER,

District Judge.

Filed in the District Court, Territory of Alaska, 4th Div. Jul. 28, 1914. Angus McBride, Clerk. By Geo. W. Albrecht, Deputy. [88]

**[Writ of Error (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable the Judge of the District Court for the Territory of Alaska, Fourth Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court, before you, between George W. Albrecht, plaintiff, and J. E. Riley and M. H. Marston, copartners, doing business as Riley and



Marston, defendants, a manifest error hath happened, to the great damage of the said George W. Albrecht, plaintiff, as is said and appears by his petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this Writ, so as to have the same at the said place in said circuit on the 27th day of August, A. D. 1914, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief [89] Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1914.

Attest my hand and the Seal of the District Court for the Territory of Alaska, Fourth Division, this 28th day of July, A. D. 1914.

[Seal] ANGUS McBRIDE,  
Clerk of the District Court for the Territory of  
Alaska, Fourth Division.

Allowed this 28th day of July, A. D. 1914.

F. E. FULLER,  
District Judge.

Due service of the foregoing Writ and receipt of copy thereof is hereby admitted this 28th day of July, A. D. 1914.

HENRY RODEN,

Attorney for Defendants in Error. [90]

[Endorsed]: No. 97-I. In the District Court, Territory of Alaska, Fourth Division. George W. Albrecht, Plaintiff, vs. Riley & Marston, Defendants. Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 29, 1914. Angus McBride, Clerk. By Geo. W. Albrecht, Deputy. [91]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

GEORGE W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners,  
Doing Business as RILEY and MARSTON,  
Defendants.

**[Citation on Writ of Error (Original)].**

The President of the United States, to the Above-named Defendants, J. E. Riley and M. H. Marston, Copartners, Doing Business as Riley & Marston, and to Henry Roden, Esquire, Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of

San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court for the Territory of Alaska, Fourth Division, holding term at Iditarod, in said Division, wherein George W. Albrecht is plaintiff in error, and you are defendants in error, to show cause, if any there be, why [92] the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1914, and of the Independence of the United States the one hundred and thirty-ninth.

F. E. FULLER,  
District Judge.

Attest my hand and the Seal of the District Court for the Territory of Alaska, Fourth Division, at Iditarod, Alaska, this 28th day of July, 1914.

[Seal] ANGUS McBRIDE,  
Clerk of the District Court Fourth Division, Alaska.

Service of the above and foregoing Citation by receipt of a copy thereof is hereby admitted this 28th day of July, A. D. 1914.

HENRY RODEN,  
Attorney for Defendants in Error. [93]

[Endorsed]: No. 97—I. In the District Court, Territory of Alaska, Fourth Division. George W. Albrecht, Plaintiff, vs. Riley & Marston, Copartners, Defendant. Citation. Filed in the District Court



Territory of Alaska, 4th Div. Jul. 29, 1914. Angus McBride, Clerk. By Geo. W. Albrecht, Deputy.  
[94]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 97—I.

GEO. W. ALBRECHT,

Plaintiff,

vs.

J. E. RILEY and M. H. MARSTON, Copartners  
Doing Business as RILEY & MARSTON,  
Defendants.

United States of America,  
Territory of Alaska,  
Fourth Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing and hereto annexed ninety-three (93) typewritten pages, numbered from 1 to 93 inclusive, constitutes a full, true and correct copy, and the whole thereof, of the original papers in the above-entitled cause, as the same appear of record and on file in my office, and that the same is made in accordance with the praecipe of the plaintiff and appellant on file herein, wherein Geo. W. Albrecht is plaintiff in error and appellant, and J. E. Riley and M. H. Marston, copartners doing business as Riley & Marston are defendants in error and appellees,

and that the same is by virtue of the Writ of Error and Citation issued in said cause and is a return thereof in accordance thereof. (Original writ of error and citation attached hereto.)

And I do further certify that this transcript was prepared by me in my office, and that the costs of same, amounting to the sum of Thirty-six and 00/100 Dollars (\$36.00), have been paid to me by plaintiff in error and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said court, at Iditarod, Alaska, this 31st day of July, 1914.

[Seal] ANGUS McBRIDE,  
Clerk District Court, Territory of Alaska, Fourth  
Division. [95]

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[Endorsed]: No. 2483. United States Circuit Court of Appeals for the Ninth Circuit. George W. Albrecht, Plaintiff in Error, vs. J. E. Riley and M. H. Marston, Copartners, Doing Business as Riley and Marston, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Received September 11, 1914.

F. D. MONCKTON,  
Clerk.

Filed September 17, 1914.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

*United States*  
***Circuit Court of Appeals***  
*For the Ninth Circuit*  
**OCTOBER TERM, 1915**

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GEORGE W. ALBRECHT,

Plaintiff in Error,

vs.

J. E. RILEY and M. H. MARSTON, Co-partners Doing Business  
as RILEY and MARSTON,

Defendants in Error.

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**BRIEF FOR PLAINTIFF IN ERROR**

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Upon Writ of Error to the United States District Court of the  
Territory of Alaska, Fourth Division

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GEORGE W. SAULSBERRY,

753 Stuart Building, Seattle, Washington.

CHARLES E. TAYLOR,

Iditarod, Alaska,

Attorneys for Plaintiff in Error.

GEO. W. ALBRECHT,

Iditarod Alaska,

In Propria Persona.

---

Filed

SEP 10 1915

F. D. Moulton





*United States*  
***Circuit Court of Appeals***  
*For the Ninth Circuit*

GEORGE W. ALBRECHT,

Plaintiff in Error,

vs.

J. E. RILEY and M. H. MARSTON, Co-partners Doing Business  
as RILEY and MARSTON,

Defendants in Error.

GEORGE W. SAULSBERRY,

753 Stuart Building, Seattle, Washington.

CHARLES E. TAYLOR,

Iditarod, Alaska,

Attorneys for Plaintiff in Error.

GEO. W. ALBRECHT,

Iditarod Alaska,

In Propria Persona.

STATEMENT OF THE CASE

Plaintiff claims to be the owner by purchase and entitled to the possession, of a certain unpatented placer mining claim at the head of Boulder creek, in Otter Precinct, Fourth Division, Territory of Alaska, and brought this action in the district court at that place, for the recovery of damages from the defendants, alleging trespass upon said claim, and cutting, and removing

timber and wood therefrom by said defendants, and their agents and servants; and claiming treble damages therefor under Section 322 of Chapter 33, Part IV, of Carter's Codes of Alaska, which reads as follows:

"Sec. 322. Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber or shrub on the land of another person, etc., \* \* \* without lawful authority, in an action by such person, etc. \* \* \* against the person committing such trespasses, or any of them, if judgment be given for the plaintiff it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be."

Defendants answered, pleading general denial, and setting up an affirmative defense that the placer mining claim involved was only a "pretended mining location," and that the ground was chiefly valuable for the timber thereon; and that the same was located by the original stakers thereof for the timber and not for the minerals.

To the affirmative defense plaintiff demurred, which demurrer was by the court overruled; the defendants then in open court asked leave to file an amended answer, which the court granted, and ordered same to be filed forthwith. No amended answer was ever filed, and in due time plaintiff moved for a default, which was denied.

Plaintiff thereupon replied to the answer, and a trial was had upon the issues as made; plaintiff endeavoring to prove a valid mining location, and a chain of title from the locators, resting in himself; the cutting and removing of the timber by the defendants and their agents and servants; and the damage to the claim based upon the cost of replacing the wood, or other



wood, back on the ground in question, for the purpose of working and mining the same.

Defendants sought to discredit the validity of the mining location by showing large quantities of timber originally on the ground, and that the ground was more valuable for its timber than for mining purposes; and showed, over plaintiff's objection, the results of recent pannings of debris at the mouths of old prospect shafts on the claim; and also sought to show that the annual assessment work had not been done continuously, in that plaintiff had not proved said work done for the year 1912, and that the claim thereby became forfeited.

Defendants further endeavored to show that the wood was cut before plaintiff took title, and that the taking away was afterwards.

The trial court held, that as forfeiture had not been pleaded, the same could not be considered, and that as for the other matters, they were for the consideration of the jury.

However, upon his own theory that no more than nominal damages had been proven, the court directed a verdict for the defendants, and upon that verdict a judgment was rendered and entered in favor of the defendants.

From which judgment plaintiff appeals and brings the case to this court upon Writ of Error.

## BRIEF OF THE ARGUMENT

### I.

The Court erred in overruling plaintiff's demurrer to defendants' first affirmative answer; for the reason that the same does not state facts sufficient to constitute a defense.

Defendants' answer (Abs. 6) consists of a denial; and, as a further and affirmative defense, alleges:

1. A fraudulent or "pretended" location of the premises as a placer mining claim, by plaintiff's predecessors in interest;

2. That the said premises were without value for minerals, and of value solely for its trees and timber;

3. That no discovery of gold was ever made within the boundaries of said mining location.

All of which amounts to no more than a denial of the plaintiff's title.

By their general denial in their answer, defendants put in issue:

- (a) Title, or right of possession in plaintiff;
- (b) Commission of the offense charged;
- (c) Amount of damages.

26 A. & E. Enc., 1st ed., 631, and notes.

Affirmative matter which may be set up in an answer must necessarily be something more than that which may be proven under the general denial; therefore, denial of title, being already in issue, is not new nor affirmative matter, and should not be set up in defense.

Hastings v. Anacortes Packing Co., 69 Pac. 776.

Defendants do not in any way connect themselves, nor try to connect themselves, with any third party claiming title, interest, or right of possession in or to the premises; nor do they claim any such title, interest, or right of possession, for themselves.

Defendants being mere trespassers, have no right to in-

quire into the good faith of the plaintiff's possession; nor to question the validity of his title.

Eberhard v. Tuolumne Water Co., 4 Calif. 308.

Strepy v. Stark, 5 Pac. 116.

Carter v. Maryland P. R. Co., 77 Atl. 301.

Reed v. Price, 30 Mo. 442.

Meydenbauer v. Stevens, 78 Fed. 794.

Rooney v. Barnette, 200 Fed. 705.

Haws v. Victoria Copper Mining Co., 160 U. S. 316,  
317.

"A person who is in constructive lawful possession of a mining claim, even though he is not the rightful owner, may maintain trespass against one who merely sets up title in a third person under whom he does not claim."

Attwood v. Fricot, 17 Calif. 37.

Page v. Fowler, 28 Calif. 610.

Nelson v. Mather, 5 Kan. 151.

"One who has entered upon land in the constructive possession of others by reason of their paper title, cannot resist a recovery by them by showing an outstanding title in another."

Jones v. Patterson, 66 S. W. 377.

"In an action for trespass, where the plaintiff had title, and at least constructive possession, and the defendant had knowledge that he was cutting on the plaintiff's premises, with no evidence to show any right in the defendant, and no connection with a stranger who claimed title, held, that the defendant was a mere intruder, and that evidence of title in a third person would not justify the act, or present an available defense."

Miller v. Decker, 40 Barb. 228.

Jackson v. Gunton, 26 Pa. Super. Ct. 203.



And in such a case as this there was no right of complaint save in the government.

Doll v. Meador, 16 Calif. 331.

Rhodes v. Craig, 21 Calif. 419.

O'Connor v. Frasher, 56 Calif. 499.

Wright v. DuBois, 21 Fed. 694.

Peabody Gold Mining Co. v. Gold Hill Mining Co., 111 Fed. 817.

Field v. Seabury, 19 How. 333.

Steel v. St. Louis Sm. & Ref. Co., 106 U. S. 447.

Health v. Wallace, 138 U. S. 573, 585.

Barden v. Northern Pac. R. Co., 154 U. S. 288, 327-330.

“A mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been committed.”

Rooney v. Barnette, 200 Fed. 705.

McIntosh v. Price, 121 Fed. 716, 718.

Haws v. Victoria Copper Mining Co., 160 U. S. 303, 317.

A defendant who is a mere trespasser cannot justify his act by showing a true title to be outstanding in a third person.

Bird v. Lisbros, 9 Calif. 1.

Piercy v. Sabin, 10 Calif. 30.

Coryell v. Cain, 16 Calif. 572.

Hughes v. Devlin, 23 Calif. 501.

Omaha & G. S. & R. Co. v. Tabor, 21 Pac. 925.

And especially is this so where the defendant does not seek to connect himself with such third party.

38 Cyc. 1058, par. 1, and notes 9 and 10.

Branch v. Doane, 18 Conn. 233.

Weimer v. Lowery, 11 Calif. 112.

Omaha & G. S. & R. Co. v. Tabor, 21 Pac. 925.

“The rule is universal that when the character of the land is in issue it is one for the Land Department to decide, and not for the courts.”

Wright v. Town of Hartville, 81 Pac. 651.

And if this be true when the question arises between different claimants, how much more is it true when the defendant makes no claim whatever—simply alleges a flaw in the plaintiff’s title on account of the character of the land.

The determination of the character of the land is entirely and solely in the Land Department.

1 Snyder on Mines, secs. 158 and 701.

Lee v. Simonds, 1 Ore. 158.

Heath v. Wallace, 138 U. S. 573.

Barden v. Northern P. R. Co., 154 U. S. 318, and cases noted.

Ryan v. Granite Hill M. & D. Co., 29 L. D. 522.

Nelson v. Brownell, 193 Fed. 642.

Lassley v. Brownell, 199 Fed. 772.

These last two cases being from Alaska.

“Until land is patented, enquiry as to equitable rights comes within the cognizance of the Land Department, and the Courts will not anticipate its action.”

Oregon v. Hitchcock, 202 U. S. 60-70; 50 L. Ed. 938.

“The evidence that the ground was not valuable for mining purposes could not be admissible on general principles. \* \* \* If the title to mining ground could be defeated by such evidence, no claim which was not paying could be considered secure.”

Correa v. Frietas, 42 Calif. 345.

Evidence of a valuable growth of timber on the land does not affect applicant's claim to a patent for placer mining purposes.

Jackson v. Roby, 109 U. S. 440.

U. S. v. Iron Silver Mining Co., 128 U. S. 673.

"Where one has made a valid location on public land mere trespassers making no claim to the ground under any of the public land laws cannot oust the mineral locator from possession by showing that the land is more valuable for some purpose other than mining."

3 Lindley on Mines, sec. 717, page 1756.

Veronda & Ricoletto v. Dowdy, 108 Pac. 482.

## II.

The court erred in denying (Abs. 14) plaintiff's motion, filed on June 27, 1913 (Abs. 13) for an order of default and judgment against the defendants, for the reason that the said defendants, in open court, on the 12th day of September, 1912 (Abs. 10), applied for and obtained permission by order of said court on said day, to file forthwith an amended answer in said cause; that thereafter they wholly failed and neglected to file such amended answer.

1. The defendants, by obtaining permission to file an amended answer, thereby elected to abandon the original, and, upon failing to file an amended one "forthwith," as by the order called for, were in default.

"Where leave is asked and granted in an action, not to amend the narr. by filing an additional count, but only to file amended narr., the original narr. must be held to be withdrawn."

Commissioners of Aberdeen v. Bradford (Md. 1912),  
51 Atl. 614.



"This application to re-plead constituted an election to abandon the answer."

Nye v. Bill Nye Gold Min. & Mill. Co. (Ore. 1905), 80 Pac. 96.

Seawell v. Crawford, 55 Fed. 729, and cases cited therein.

" \* \* \* this is what defendants did when they obtained leave to file an amended answer to the complaint. But it is said they have not complied with the order, and did not file the answer within the time allowed. If this is the case, \* \* \* plaintiff's remedy was an application to the court below for judgment for want of an answer. \* \* \* "

Gaines v. Cyrus (Ore. 1893), 31 Pac. 833.

In the case of Gettings v. Buchanan (Mont. 1896), 44 Pac. 77, the court, in considering and summing up all the cases cited as against the above, says:

"We have examined these cases and find that in their facts they are divisible, perhaps, into three classes: (1) Where the parties went to trial on the old answer; (2) where the defendant elected to stand on the old answer; (3) where it did not appear that the defendant had elected to file a new answer. It is to be observed, however, that in this case the defendant was not in the position set forth in either of the above classifications. On the contrary, he himself elected to file a new answer. \* \* \* He expressly and in open court elected to plead over."

In the case of Machine Co. v. Redfield, 18 Kan. 555, cited with approval in the foregoing case, Justice Brewer is quoted:

"The court then had power to require an answer to be filed, for, though the language of the statute is 'allow,' yet we think this grants something more than mere author-

ity to consent. But, even if not, the order in this case was by consent of parties, and the court certainly had the power to enforce compliance with an order to the entry of which the parties had consented. It seems to us also that it was the duty of the court to enforce the order, and that the plaintiff had a right to rely upon compliance, or take advantage of the default."

In the case now being reviewed, had the parties gone to trial on the original answer, an amended answer would have been waived; or, if the defendants had elected to stand on the original answer, they could have done so, for it would be a foolish thing to require the filing of a new answer which could easily be a mere duplicate of the old; and, if the defendants had said nothing, it would have left the pleadings in order as they stood. But none of these things happened; and instead, the defendants asked and were granted leave to file an amended answer, thereby under all the decisions, clearly electing to abandon the original answer; and, upon failing to file an amended answer "forthwith," were in default.

To hold, as the lower court did, that the defendants had not elected, places plaintiff in the position that he must claim a default to shut off an amended answer, and must prepare to meet the original answer and also to resist an application to open the default, and in the end have no possible way of knowing which ground the defendants will "elect" to stand upon, a position which it is the exact object of all pleading to avoid.

### III.

The court erred in requiring plaintiff to prove the original location of a placer mining claim by plaintiff's predecessors in interest. (Abs. 28.)

Trespass may be maintained by one in possession, actual or constructive, and title, in such a case as this, is constructive possession.

“Constructive possession of land is that possession which the law presumes the owner has, in the absence of evidence of exclusive possession in another.”

(Me. 1911) *Inhabitants of Millinocket v. Mullen*, 78 Atl. 1120.

“Constructive possession follows legal title, the rightful owner being deemed in possession until he is ousted or disseized. Possession follows the title, in the absence of actual possession adverse to it.”

(Ark.) *Woolfolk v. Buckner*, 55 S. W. 168.

“The title, whether with or without possession, which will support an action in trespass, is most commonly obtained by deed.”

26 A. & E. Enc., 1st ed., 587.

“The Supreme Court of the Territory (Montana) argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiff did not introduce, first of all, proof of their mining records, which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the locus in quo, were all unavailing and inadmissible.

“We know of no rule of law which justifies this action.”

*Campbell v. Rankin*, 99 U. S. 265; 25 L. Ed. 435.

And pleadings may be amended to conform to the proof.

*Black v. Teeter*, 1 Alaska, 564.

Therefore it was error to require that any particular fact be proven.



This argument also applies to this phase of Specification VI, the court therein holding that it was incumbent upon the plaintiff to show ownership. (Abs. 106.)

This likewise applies to Specification VII. The court erred in deciding: "It is necessary, of course, to show a valid location; that is, to show such a discovery as is required by law." (Abs. 106.)

And also to specification VIII. The court erred in further deciding as follows: "If it conclusively appeared that plaintiff had no title at the time the trespass was committed, of course, there would be no damage."

#### IV.

The court erred in granting defendants' motion for a directed verdict at the conclusion of the testimony.

If there had been a total failure of proof on the part of the plaintiff, a directed verdict against him would have been proper, but there was evidence on every proposition necessary to be sustained, which, if believed by the jury, would have justified a verdict for the plaintiff, in accordance with the prayer of the complaint.

In the evidence the title of the plaintiff was affirmatively fully shown; and not at all controverted, save by an attempt to show that the mining claim was not now valuable for minerals, and that therefore there could not have been a valid discovery; hence no claim, and no basis of title.

All of which was inadmissible as evidence, and not true as a matter of reason, or of law.

But if held otherwise there would be a "question of fact for the jury to determine," as the court said. (Abs. 107.)

The facts of cutting and of removing the wood were not

denied, but there was an attempt to evade the responsibility therefor by trying to show that the cutting was done before the plaintiff took title, and the removing afterward. The proof of this all depended upon the not very positive assertion of Robert Mann, "I am almost sure that I got through about the middle of September." (Abs. 65.)

Mr. Mann himself testified that he "cut for Mr. Riley in the fall" (Abs. 56), and in view of the circumstances the jury might well have considered that "about the middle of September" did not necessarily mean that no wood was cut after the 15th day of September, when the plaintiff took title (Abs. 23), noting that in his positive statements Mr. Mann fixed the date as October 1st. (Abs. 64.)

Furthermore, none of the statements of Mr. Mann had to be, as a matter of law, accepted as true.

The matter was for the jury.

The defendants did not, in evidence, deny getting the wood, nor going upon the premises of the plaintiff to get it, nor its value; and the questions of trespass, damages, and the amount, should have been left to the jury.

"The action was for trespass; the question of damages is a question particularly for the determination of the jury."

(Calif. 1853) *Drake & Burlingham v. Palmer, Cook & Co.*, 4 Calif. 11.

"Where there is evidence to show the constitutive facts advanced by the party sustaining the burden of proof, it is for the jury to say whether the evidence is sufficient for that purpose."

2 Thompson on Trials, sec. 2243; quoted with approval in

(Kan. 1908) Harrod v. Latham M. & C. Co., 95 Pac. 14.

"A case should be submitted to the jury unless there is an entire lack of evidence tending to maintain the issues on behalf of the plaintiff, or, unless upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover."

Tippin v. Ward (1875), 5 Ore. 450.

"Of course, such an instruction could not be upheld where there was conflicting evidence as to material facts, which the jury had a right to pass on; but, where there is no substantial conflict of evidence as to the facts determinative of the case, or such facts are admitted, there the judgment will not be reversed for such instruction, although **the practice is hazardous, and can be sanctioned only in the clearest of cases.**"

O'Connor v. Witherby (Calif. 1896), 44 Pac. 227.

## V.

The court erred in holding and deciding that no title to the wood passed under the conveyance to the plaintiff, because said wood was cut before the date of the said conveyance. (Abs. 105.)

While it is not at all certain that "the wood was all cut, not prior to the date alleged in the complaint, but prior to the time of the conveyance to the plaintiff, and that it was there on the ground, not requiring anything further to be done to it," yet that question, if material, was for the jury.

In considering this phase of the court's decision, one is impelled to ask the question, or questions:

To whom, then, does the wood belong?

Suppose the wood had been cut by the locator of the claim; he could not sell it, because it was not his to sell; the wood and timber on the mining claim was part of it, exempt



from molestation except for use in developing the claim, being an absolute necessity thereto.

All he sold was his possessory right to that mining claim; he owned nothing on it except his possessory right, and when he let that go he let go everything pertaining to the mining claim.

The government did not own it, except in trust for the locator. The government could not sell it, except for the benefit of the locator or possessor of the mining claim.

See *Anderson v. U. S.*, 194 U. S. 394; 48 L. Ed. 1035.

The natural supposition, then, is that the wood, either standing or cut, went with the mining claim, and became part of it, passing to the new owner of the possessory right, for mining purposes only, and was subject to protection under Sec. 322 of Chapter 33, Part IV, of Alaska Code of Proc.—whenever any person shall cut down or carry away any tree, timber, etc.

This was an unpatented placer mining claim, and the only possible title or right which anyone had or could get was the possessory right to use the wood in the working and improvement of the claim.

2 Lindley on Mines, sec. 551.

*Teller v. U. S.*, 113 Fed. 273.

“A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so he has mere license to work the ground for the precious metals therein, and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently.”

*U. S. v. Nelson*, Fed. Cas. 15, 864.

Notwithstanding the fact that it may be treated as per-

sonalty for the purpose of replevin, its true nature is much nearer that of a fixture, as it cannot be used save in connection with the ground from which it was taken.

“To convert an article which is part of the freehold into a chattel state by severing it from the realty, the act of severance must be done by one having authority or right to do so.”

Lewis v. Rosler (1880), 16 W. Va. 333

“In Brock v. Smith, 14 Ark. 431, it was held that where one entered upon land as a trespasser, felled timber, and split it into cordwood, the bestowal of his labor in splitting the timber into cordwood neither wrought a change in its specific character nor gave him any title by accession.”

1 A. & E. Enc., 1st ed., 55.

“Therefore where timber is cut by a trespasser without the owner’s assent, he may claim it as part of the freehold while it remains upon his premises.”

Altomose v. Hufsmith, 45 Pa. 121.

Harlan v. Harlan, 15 Pa. 507; 53 Am. Dec. 612.

The United States could not take the wood, nor dispose of it while on the claim, nor could the owner of the claim invoke the aid of the United States.

“The owner of a mining claim has the right to the timber thereon, and must protect it from trespassers. He cannot look to the government to bring suit for him.”

1 Barringer & Adams, page 601.

The rule is laid down in the case of U. S. v. Anderson, 194 U. S. 394, 48 L. Ed. 1035, that where one has done all that is necessary for him to do to acquire title to government land, and thereafter iron and stone is removed by trespassers, the damage therefor is done to the claimant under the government.

Applying that rule to this case, the valid inception of a placer mining claim confers upon the locator the right to recover damages for cutting or removing timber therefrom after the initiation of his rights.

Had this ground been ordinary timber land from which the plaintiff's grantor had a right to remove the timber, then it might well be claimed that cordwood completely severed from the realty did not pass by an ordinary conveyance of the land alone. Or if it had been public land at the time of the cutting of the cordwood; and the plaintiff had sought to get title to the land afterward, by location, it is thought that the title to the wood might remain in the government; although most of the cases found have been Canadian which hold the other way—that title passes to the locator.

So long as this remained a placer mining claim—that is, until its abandonment, or its cancellation by appropriate action by the government—there was no legal right or power on earth by which that timber could be taken away from the ground; hence, in all reason it must be held to be an essential part of the ground itself, and to pass with it by deed.

Reasoning by analogy from the law of accession, or from the law of fixtures, this cordwood must be deemed to have been the property of the plaintiff at all times after his taking of title—it was “essentially a part of the freehold.”

“As between vendor and purchaser, the intention of the owner as to the annexation of a fixture to the freehold may be of little weight if the structure is essentially a part of the freehold, and is so entirely indispensable for the use for which the freehold is intended that the secret purpose of the owner cannot control the rights of others which de-



pend upon the inference to be drawn from what is external and visible."

*In re Beeg*, 184 Fed. 522.

"The court here said that, applying the general principle that all movables intended for the exploitation of the fundus became incorporated into it, it would seem clear that all materials intended to be used in building and repairing should be immovables by destination."

*Morton Trust Co. v. American Salt Co.*, 149 Fed. 540.

And similarly stone gathered upon the land [*Ellis v. Wren*, 1 S. W. 440] and building material generally [*Rahm v. Dommayer*, 15 L. R. A. (N. S.) 727] have been held to pass with the land.

"Whether personalty connected with or attached to realty becomes a part thereof, so that it cannot be removed therefrom, depends on the circumstances under which placed on the realty, the uses to which it is adapted, and the intent of the parties."

*Pendley Brick Co. v. Hardwick & Co.* (Ga. 1909), 64 S. E. 664.

And the intention is found in all the facts and circumstances.

*McCammon v. Cooper* (Ohio), 69 N. E. 658.

*Madison v. Madison* (Ill.), 69 N. E. 625.

There being nothing to the contrary alleged nor shown, it must be presumed that the parties, grantor and grantee, had intended obedience to the law, and all the facts and circumstances irresistibly point to the intent that the wood should pass with the ground. There was nothing else which could possibly happen to it, being "there on the ground."

Turning from reasoning by analogy to the law of transfer

of property: Probably few text-writers are, or have been, more careful of their language than is Devlin, the author of *The Law of Deeds*, and he says: A deed conveys not only the land described, but everything appurtenant to it.

2 Devlin, 3d ed., sec. 1192.

Black's Dictionary gives: "Appurtenant. Belonging to; accessory or incident to; adjunct, or annexed to; answering to accessorium in the civil law." (2 Steph. Comm. 30, note.)

Of course the trespasser who cut the wood had no intention of using it on the claim, but it would seem as though cordwood which can have no legal use other than on and for the benefit of the placer mining claim from which it was cut, must be "appurtenant" and pass with the deed.

And if it be insisted that the cordwood must be personalty without regard to considerations other than its physical nature, still

"the rule with respect to chattels of this character [not attached] is, that if they are intended for use on the land on which they lie, they pass by a deed of the realty."

2 Devlin, 3d ed., sec. 1205.

"The general principle seems to be that all articles that may properly be considered as belonging to the real estate, necessary to its use and enjoyment, whether firmly fixed or temporarily detached, or from their nature only constructively annexed, pass by a deed of the land."

2 Devlin, 3d ed., sec. 1207.

"Where the deed of realty makes no reference to the personal property thereon, it is a question for the jury whether the parties to the conveyance intended that stakes and boards piled on the realty for use in making general repairs were to pass to the grantee."

Hinkle v. Hinkle (1879), 69 Ind. 134.

“Personalty fitted to be used with realty and essential to its enjoyment, and on the realty at the time of its conveyance, will pass with the realty.”

*Farrar v. Stackpole* (1829), 6 Me. 154; 19 Am. Dec. 201.

## VI.

The court erred in holding and deciding (Abs. 106):  
 “There is no title shown to the land or wood, and it seems to me that it is incumbent upon the plaintiff, having alleged that he was the owner, to show something in the nature of ownership at least.”

Title to the land is shown:

by the testimony of C. Purdy, as to the staking and marking of the boundaries of the claim (Abs. 29 to 33, and 46).  
 by the testimony of J. F. Fox, as to the staking and marking of the boundaries (Abs. 33, 34 and 37); as to discovery (Abs. 38 to 41); and as to recording (Abs. 39); the latter point being also shown by the original records (Abs. 35).

by the testimony of Purdy (Abs. 46); of Fox (Abs. 41); of W. R. Day (Abs. 48 and 51); of F. L. Kehoe (Abs. 50); which, with plaintiff's Exhibits “A” (Abs. 17), “B” (Abs. 19), “C” (Abs. 20), and “D” (Abs. 23), show a clear chain of title to the entire placer mining claim, the Elliott association, resting in the plaintiff.

The plaintiff's possession is shown at page 53 of the abstract:

“No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, nor build on it, nor cultivate it, nor enclose it.”

*English v. Johnson*, 17 Calif. 107.



Evidence of title raises a presumption of possession; and evidence of possession raises a presumption of title—one aids the other.

“Evidence of title raises a legal presumption of legal or constructive possession.”

Abbott’s Trial Brief, 2d ed., 535.

“Possession under claim and color of title is sufficient evidence of title as against a mere trespasser.”

Douglass v. Dickson, 1 Pac. 541.

“Possession under invalid location makes color of title.”

Protective M. Co. v. Forest City M. Co. (Wash.), 99 Pac. 1033.

As is said by the court in M’Quillan v. Tanana Elec. Co., 3 Alaska, 119:

“It must not be overlooked that Section 322 of the Alaska Code of Civil Procedure is as much an Act of Congress as are those provisions by which the United States maintains civil and criminal suits against trespassers upon its lands, and that it is the latest expression of Congress on that subject. The miner is given a property interest in his claim, and in Section 322, Congress has also declared that whenever any person shall cut down, \* \* \* **or carry off any tree, timber,** etc., without lawful authority, the person so injured may recover treble damages for the injury.”

As to plaintiff’s peaceable and lawful possession, defendant was a wanton trespasser, and must respond in such damages as it has caused them.

A qualified locator who has in good faith located a valid placer mine and is in possession thereof in strict compliance with the mining laws ought to have, and in said Section 322 does have, a right to protect his timber thereon.

A valid location of a placer mining claim confers upon the locator and owner the right to recover treble damages from a wanton and willful trespasser for cutting and removing trees therefrom.

McQuillan v. Tan. Elec. Co., 3 Alas. 110.

The character of the title claimed by the plaintiff, and proved at the trial, is thus described by the Supreme Court of the United States:

“They were discoverers of the claim. They marked the boundaries by stakes so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for them or their vendees.”

Noyes v. Mantle, 127 U. S. 348; 32 L. Ed. 168.

The court in the case at bar seems to have been of the opinion that no title at all was proved by the plaintiff.

And even if the above showing was not such as to satisfy the mind of the court, still, if the question of title were a necessary one to be answered, **the jury should have passed upon it.**

## IX.

The court erred in deciding (Abs. 108):

“It is an action to recover treble damages, under the

statute, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover; that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff."

This can only be true upon the assumption that the plaintiff had no title in the wood, but as we have shown, the title to the wood did, as a matter of fact and as a matter of law, rest in the plaintiff. There was plenty of evidence as to the value of the wood (Abs. 66 to 68), and it is a matter of common knowledge that the timber on a placer mining claim in Alaska is a valuable and necessary aid to its proper and economical working.

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

If the wood were taken, which question of fact is for the jury, then as a matter of law there must have been very substantial damages.

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

**And the amount of the damages should have been assessed by the jury.**

Drake & Burlingham v. Palmer, Cook & Co., 4 Calif. 11.

This is an action brought under the statute, Section 322, Chapter 33 of Part IV of Carter's Codes of Alaska, which reads as follows:

"Sec. 322. Whenever any person shall cut down, girdle or otherwise injure **or carry off** any tree, timber, shrub on the land of another person, etc., etc., without lawful authority, in an action, etc., if judgment be given for



the plaintiff, it shall be given for treble the amount of damages claimed, etc.”

We contend that this section goes to the **carrying off** of timber, windfalls, logs, without such cutting down; the statute nowhere confines itself to standing timber, so that it makes no difference whether the timber was cut either before or after plaintiff's possession. We cannot see that such a legal quibble would give any trespasser a right to go on plaintiff's land and steal his wood, and get away with it, because he did not cut it, or because the trees were not standing.

## X.

The court erred in deciding (Abs. 108):

“The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damage.”

There are here errors in fact—questions which were for the jury—and error of law in holding, “There is nothing more than the entry upon the land,” as well as the error of law in refusing to submit these questions to the jury.

The jury might have believed Mr. Mann's off-hand statement, “I am almost sure that I got through about the middle of September,” to be conclusive on the point, but they might well have noted that Mr. Mann kept a book (Abs. 65) and that he swore repeatedly and positively as to not cutting after the first day of October (Abs. 64), and so noting, certainly would have queried: “If he kept books and could swear to the 1st of Oc-

tober, why did he not swear positively to the 15th of September—if that were true?”

There was plenty of time between “about the middle of September” and the 1st of October for a considerable quantity of wood to have been cut, and for very substantial damages to have been done.

#### XI.

The court erred in deciding (Abs. 109):

“Now, the view that I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood that would necessarily be the measure of damages.”

#### XII.

The court erred in deciding (Abs. 109):

“There has been no testimony whatever in this case as to the value of the mining claim, either before or after the wood was gone.”

The above two specifications may be considered together, for taken together they amount to a holding that the only way to prove damages for the cutting **or** removing of timber from a placer mining claim in Alaska is to show the value of the claim before trespass, and its value after, and, of course, take the difference—a position upon the part of the court in support of which not one single case has been found.

Plenty of cases as to agricultural and timber lands, but not one case of a placer mining claim in Alaska, or anywhere else in the world.

In an action for timber cut **or** carried away from the land of the plaintiff, the measure of damage is:

Where the defendant is a knowing and willful trespasser,

the full value of the property at the time and place of demand, or of suit brought, with no deduction for labor or expense of defendant.

Where defendant is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

*Bolles Woodenware Co. v. U. S.*, 106 U. S. 432; 27 L. Ed. 230.

The court saying: "To hold that when the government finds its own property in hands but one remove from these willful trespassers, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer, by providing a safe market for what he has stolen, and compensation for the labor he has been compelled to do to make his theft effectual and profitable."

And had this been ordinary timber land, still the rule laid down by the court in the case at bar would have been wrong.

"If the trees have a value which can be accurately measured without reference to the soil on which they stand, the recovery may be for the value of the trees destroyed or injured and need not be for the value of the land before and after the injury."

*U. S. v. Taylor*, 35 Fed. 488.

"In an action for cutting and removing standing timber, the plaintiff may recover the value of the timber at the place where it stood when the trespass was committed, and the defendant cannot insist that the measure of damages is the value of the lot before and after the timber was cut."

*Stanton v. Pritchard*, 4 Hun. 266, as explained in *Firmin v. Firmin*, 9 Hun. 572.



“In trespass, if the value of the timber covered the damage done, that will be the basis of recovery, but if not, it should be all damage done to the land by the cutting and removal of the timber.”

Thompson v. Moiles, 46 Mich. 42.

“For trespass to real property, the damages are such an amount as will compensate for the injury done.

Ostrom v. San Antonio (Tex.), 77 S. W. 829.

“True measure is the highest injury suffered.”

Salstrom v. Orleans Bar Gold Mining Co. (Calif. 1908).  
96 Pac. 293.

“ \* \* \* and that measure will be applied which is most beneficial to the injured party.”

Donk Bros. C. & C. Co. v. Novero, 135 Ill. App. 633.

It is not only a matter of common knowledge that an unprospected placer mining claim in Alaska has no possible standard of value, but the naked knowledge as to what a placer mining claim is must carry with it a thorough understanding of this fact.

A “wildcat” has no certain intrinsic value, and its ownership is but a right to its exploration and results therefrom; with the use of the timber as a valuable and necessary aid thereto.

In the very nature of things the damage to a “wildcat”—an unprospected placer mining claim—by the cutting or removal of the timber, is in the destruction of the possibility or practicability of its development; or in the added burden of expense thereto.

“Plaintiffs were the owners and in possession of a valuable mining claim; the court knows by common knowledge that the timber thereon was a valuable and necessary aid to the proper and economical working of the claim; plaintiffs were injured by the wanton and unlawful tres-

pass of the defendant in just the value of the timber taken."

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

In the above case the court speaks of a valuable mining claim, but there was not a word in the record about any value except the value of the wood—the wood was valued at \$3,000. The damages claimed, and allowed, were \$3,000, as the court said, "just the value of the timber taken."

### XIII.

The court erred in deciding (Abs. 110):

"Giving the fullest effect to the testimony of the plaintiff, as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and marking of boundaries, I cannot see, if it were submitted to the jury, that they would be justified in finding anything more than nominal damages, and taking that view of the case, I think it not worth while to submit it to the jury."

The plaintiff was entitled to have the jury say as to whether the damages were nominal or substantial.

"In an action of trespass, the question of damages is a question particularly for the determination of a jury."

Drake v. Palmer, 4 Calif. 11.

And if the damages were brought in as nominal merely, he had a right to a judgment for whatever the damages were.

" \* \* \* in such a case, merely entering the land and cutting boxes or chipping trees and removing therefrom crude turpentine, entitled plaintiff to nominal damages, though no actual damages were done."

U. S. v. Taylor, 35 Fed. 484.

"For trespass on land, at least nominal damages can be recovered if no special damages are proven."

Postal Telegraph-Cable Co. v. Kuhn (Ga.), 55 S. E. 967.

Sharpless v. Boldt (Pa.), 67 Atl. 652.

Chase v. Cochrane (Me.), 67 Atl. 320.

Prewitt v. S. W. Tel. T. Co. (Texas), 101 S. W. 812.

Dwire v. Hanley (Conn.), 65 Atl. 573.

Yoder v. Reynolds, 72 Pac. 420.

U. S. v. Mock, 149 U. S. 277.

Hodges v. Pine Products Co., 33 L. R. A. (N. S.), 74.

Bishop v. Readsboro Chair Mfg. Co., 36 L. R. A. (N. S.) 1171.

"It is suggested that \* \* \* the defendant \* \* \* loses nothing. But he has lost a case which he is entitled to win, and the costs incident thereto."

Wait v. McKibben, 140 Pac. 862.

#### XIV

The court erred in deciding (Abs. 110):

"I might say, further, in regard to one point in this case, that the testimony did not show that any trespass had been committed by the defendants, or by anyone acting for them."

The uncontradicted testimony of Robert Mann shows (Abs. 56) that he cut wood for Mr. Riley; that the defendants went security for the grocery bills of several choppers, all working on the premises of the plaintiff (Abs. 57, 59, and 60); and that the defendants took the wood on and from the Elliott association, the premises of the plaintiff (Abs. 57).

As to the testimony of this Mr. Mann, we particularly desire to call the court's attention to some of it.

While Mr. Mann was a witness called by the plaintiff, yet



it can be readily seen that he was an adverse and unwilling witness for the plaintiff, and tried in every way to turn his testimony to and for the benefit of the defendant.

In answer to a question asked him (Abs. 56), "What were you doing in the fall of 1911 and winter?" he says:

"The fall of 1911 I was cutting wood on Boulder creek. \* \* \* "

Q. "Who were you cutting wood for in 1911?"

A. "Well, I cut for Mr. Riley in the fall. \* \* \* "

\* \* \* \* \*

And at Abs. 57:

Q. "What became of the wood you cut?"

A. "I sold it to Mr. Riley."

Q. "What did it cost—how much did it cost to cut it?"

A. "Well, I didn't make any more than wages. I got six dollars a cord for it."

Q. "And was that wood delivered to Riley & Marston?"

A. "It was delivered to Riley & Marston on the ground."

Q. "Did you cut for Riley & Marston?"

A. "I promised to sell my wood to Riley & Marston for his going security for my groceries at the store. I promised to sell him wood; I had been cutting for some time."

But conceding for a moment, for the sake of argument only, we contend that it makes no difference whether the wood was cut either before or after conveyance to plaintiff and his possession of the mining claim.

It was cut on the claim, by a willful trespasser, who knew before he commenced cutting that it was a mining claim, and

was purchased by the defendants, if not hired to be done, at \$6.00 per cord, and was carried away by the defendants, in violation of statute, Section 322, Chapter 33, Carter's Code of Alaska, Part IV.

The timber at all stages of the conversion was the property of the plaintiff. Its purchase (if this was purchase) by defendants did not divest the title or right of possession.

\*            \*            \*            \*            \*

It is also plain that by purchase from the wrongdoer the defendants did not acquire any better title to the property than the vendor had.

Bolles Woodenware Co. v. United States, 106 U. S. 432;  
27 L. E. 230.

The testimony of David Mutchler, uncontradicted and unquestioned, shows (Abs. 66, and 67) that he hauled the wood which Mann and others cut, and which Mann testified (Abs. 56, and 57) was cut from the Elliott association, for the defendants, at their orders, and for which they paid.

And one of the very significant matters of this trial was the fact that when Mr. Riley, one of the defendants, testified (Abs. 100), he did not attempt to deny any of the allegations of the plaintiff's pleadings, nor any of the testimony on the part of the plaintiff. The premises, the cutting, the taking and hauling away; the quantity, and value, all were passed in silence.

Is it reasonable to suppose that a defendant able to make a denial would not have done so? How would the jury have regarded this? The plaintiff had a right to know, either specifically under the instructions of the court, or generally by their verdict.

## XV

The court erred in failing and refusing to submit the case to the jury at the conclusion of the testimony.

## XVI.

The court erred in giving and entering judgment in favor of the defendants and against the plaintiff.

The above two, the concluding specifications, naturally consolidate.

The case for the plaintiff was proven in every material detail, or if not, that was a question for the jury.

## CONCLUSION

In looking over the records of this case, counsel for the plaintiff is of the honest opinion that there has been a decided miscarriage of justice.

Being twice in default, defendant has been allowed to come in and defend, setting up matters entirely without the jurisdiction of the trial court.

It seems incredible that one, owning by purchase, and in possession of a placer mining claim in Alaska, performing annually the necessary assessment work required by law, and situated as we are here, six hundred miles away from the court, which is here for a term of only one or two months in the year, should be compelled to stand by helpless and see his claim despoiled by trespassers, and then have such acts of trespass ratified by the court.

Plaintiff submits that all the proof necessary to have succeeded in this case has been furnished.

The right of possession of plaintiff in the ground has, we



think, been conclusively proven by the evidence of J. F. Fox, W. R. Day and C. C. Purdy, as to the location of the ground as a placer mining claim; the setting out of stakes; the marking of the boundaries; the discovery of gold; the recording of the claim in the office of the recorder of the precinct; the subsequent performance of annual assessment work required by law; the successive deeds and conveyances from the locators down to the plaintiff; and the testimony of the plaintiff himself as to purchase; that he is the owner of the record title and in the actual possession of the claim, and has had the annual assessment work performed. All of this is shown, although we think and submit that it was sufficient, as against a mere trespasser, to show only possession of the plaintiff under his paper title, without having to search the ends of the earth to find the original locators of the claim.

As to trespass by the defendants, their agents or servants, from the evidence of Robert Mann, it cannot be disputed that the defendants trespassed upon this mining claim, by and through their agents, servants and employees. The witness Mann says he cut the wood on this claim and SOLD (?) it to the defendants for what it was worth to cut it (wages), \$6.00 per cord, and that he promised to sell (?) it to the defendants if they would guarantee his grocery bill, which they did and which they paid.

And the testimony of this same Mann to the effect that others, to wit: James Furlong, James Kelly (with whose affairs he seemed to be very intimate, having worked with them), cut wood and SOLD (?) it to the defendants on similar terms, and several others who were on the same ground cutting wood—hundreds of cords of it.

And the testimony of the freighter, David Mutchler, who

hauled the wood away from the claim for the defendants and received \$4.00 per cord for it, and who said that wood could not be replaced on the claim for less than \$12.00 per cord.

And the testimony of the defendant J. E. Riley himself, who, being on the witness stand, did not attempt to deny the trespass, but confined his testimony to the statements that he could not find any gold on the dumps of some old shafts that he found on the claim.

It is the common experience of miners that many shafts may be sunk on a mining claim, resulting in many disappointments and blanks, and yet other shafts on the same claim may fully reward and repay the prospector and miner for his trouble, and in a claim of 160 acres, such as is the claim mentioned herein, the testimony of defendants and others as to finding no gold on these dumps must go for naught, in the light of the evidence of the locators of a valid discovery of gold on the claim, and the still present belief of those same locators that gold is there in paying quantities.

Nor can we see why the failure of the defendants to find gold in these old dumps be any excuse for their acts of trespass and the taking of the wood from the claim.

Plaintiff has sued for damages to his mining claim, basing his damage on the fact that this wood, like the wood on every mining claim in Alaska, is the one important item necessary to the working of such claim.

As said in the case of *McQuillan v. Tanana Elec. Co.* by our own court here in Alaska:

“The court knows as common knowledge that the timber thereon was a valuable and necessary aid to the proper and economical working of the claim; plaintiffs



were injured by the wanton and unlawful trespass of the defendant in just the value of the timber taken.”

It is also a matter of common knowledge that almost without exception the operation of every placer mine in the interior of Alaska necessitates the consumption of hundreds of cords of wood each year.

David Mutchler, freighter, testified that wood could not be replaced on plaintiff's mining claim for less than twelve dollars per cord. Plaintiff has based his damage at \$3.00 per cord, claiming treble damages under the statute of Alaska governing such cases.

The trial court based his decision in this case partly for the reason that some of this wood, if not all, had been cut before the inception of plaintiff's title to the ground, but the testimony shows that every stick of it was **taken and carried away** after the date of plaintiff's deed, and as stated before, the statute does not confine itself to the cutting, but reads in the alternative, “**or carry away.**” So that the fact that the wood was carried and hauled away under defendants' instructions renders them liable. They were trespassers, and knew they were, and knew that they were doing wrong, and had no business on that claim.

The trial court further says that we did not prove that the claim had any value as a mining claim, either before or after the wood was taken. We do not know what experience the trial court has had with placer mining claims in Alaska, or elsewhere, but plaintiff himself knows that it is an impossibility to place a value on unproved placer mining ground, which may require thousands of dollars' outlay in prospecting, and then may prove worthless or otherwise, as the case may be. It is certain that



where wood is the principal working asset of a mining claim, such claim doubtless must be damaged by the taking away of that asset.

As to the amount of damage sustained to plaintiff's claim, we respectfully submit that we have proved damage in every cent claimed in plaintiff's complaint.

We earnestly contend that the owner and holder of an undeveloped placer mining claim, either in Alaska or elsewhere, is entitled to protection against wanton trespassers who seek to despoil that claim by taking away its most valuable asset and converting same to their own use.

We cannot understand why the trial court should direct a verdict for the defendant, and at the same time admit that plaintiff might be entitled to nominal damages.

We earnestly submit that under the law and the evidence in this case we are entitled to recover every cent prayed for in the complaint, and respectfully ask this honorable court for judgment accordingly.

Respectfully,

GEO. W. SAULSBERRY.  
CHARLES E. TAYLOR.  
GEO. W. ALBRECHT.







No. 2483

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE W. ALBRECHT,

*Plaintiff in Error,*

VS.

J. E. RILEY and M. H. MARSTON, co-  
partners doing business as RILEY AND  
MARSTON,

*Defendants in Error.*

## BRIEF FOR DEFENDANTS IN ERROR.

T. C. WEST,

FERNAND DE JOURNEL,

HENRY RODEN,

*Attorneys for Defendants in Error.*

Filed this.....day of October, 1915.

**Filed**  
FRANK D. MONCKTON, Clerk.

By.....1915.....Deputy Clerk.

F. D. Monckton,



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## BRIEF FOR DEFENDANTS IN ERROR.

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As has been set forth by plaintiff in error in the statement of the case contained in his brief, this is an action for the recovery of damages from the defendants, alleging trespass upon a certain mining claim and cutting and removing timber and wood therefrom by said defendants and their agents and servants, and claiming treble damages therefor under Section 322.

The section provides that,

“\* \* \* if judgment be given for the plaintiff it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be”.



In paragraph IV of plaintiff's complaint, he alleges:

"That the value of said timber and wood to plaintiff and the reasonable value thereof was, and is, three dollars (\$3.00) per cord; that by reason of the acts of the said defendants as above set forth, plaintiff lost said timber and trees sufficient to make 700 cords of wood, and said placer mining claim belonging to plaintiff was greatly damaged, and lessened in value to the amount of \$2100.00, that being the value of said wood aforesaid."

It will be noted that the damage alleged is damage to a mining claim and not for the loss of wood or timber. It will be conceded, no doubt, by all parties to this action, that the owner of an unpatented mining claim can only use the timber thereon in so far as same may be necessary for the operation of said mining claim. During the course of this entire case it has not anywhere been shown that the timber or wood alleged to have been removed from the claim in question was necessary to the operation of the mining claim or that the value of the mining claim was lessened by its removal and nowhere has it been shown that the mining claim has been at all injured or damaged by the cutting or removal of said timber. In so far as anything appears from the record in this case, the timber so cut and removed did not lessen the value of the mining claim. It is an elementary rule of law, of course, that, where damages are sought to be recovered, some damage must be shown, and before a plaintiff in an action such as this can

recover treble the amount of the alleged damages, he must, of course, show what those damages were.

The plaintiff in error has cited a great many points and authorities in his brief, and it may be said that if in the course of the trial of this case he had proved the damages claimed, those points and authorities might be applicable, but, under the circumstances, we cannot see where they can have any application here. Further answering this phase of the brief of the plaintiff, we deem it only necessary to quote from the opinion of the learned judge in the court below, as follows:

“It is an action to recover treble damages, under the statutes, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover—that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff. The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damages. And while this question has not been raised in this case, as to the measure of damages, in an action of this kind if it were submitted to the jury it would be necessary to consider what is the plaintiff’s measure of damage for wood taken off the mining claim. He has not an absolute fee-simple title. He simply has the right to his mine upon the ground, so long as he complies with the Statutes of the United States. He has the



right to use the wood upon the ground for mining purposes, but he has not the right to take the wood from the ground and sell it elsewhere. The Government can still restrain him from doing that. Now the view I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood, that would necessarily be the measure of damages. There seems to be several different rules laid down by which damages are measured, where wood or grain is taken from land—timber particularly. It may be measured by the value of the wood upon the mining claim; or it may be measured by the value at the place where it was converted by the other party. In this case I suppose it would be upon Otter Creek, if that rule were applied—or it may be the difference between the value of the land with the wood upon it, and the value with the wood gone. And I think the latter rule would be the one to apply in a case of this kind, because the owner of a mining claim has no right to sell the wood. He has only the right to use it upon the ground; and the damage so sustained would be the difference between the mining claim with the wood upon it, and the value of the claim if the wood were gone. There has been no testimony whatever in this case as to the value of the mining claim either before or after the wood was gone.

“Giving the fullest effect to the testimony of the plaintiff, as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and marking of the boundaries, I cannot see, if it were submitted to the jury, that they would be justified in finding anything but nominal damages. And, taking that view of the case, I think it is not worth



while to submit it to the jury. Defendant's motion for a directed verdict will be granted."

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**AS TO DEFENDANT'S FAILURE TO FILE AN AMENDED ANSWER.**

Plaintiff makes much of the court's action in denying his motion for an order of default and judgment against the defendants for the reason that the said defendants in open court applied for and obtained permission to file forthwith an amended answer in said cause and that they failed and neglected to file such an amended answer.

The transcript shows that a demurrer was interposed to defendant's affirmative defenses contained in their answer. No demurrer was interposed, in so far as this record shows, to the general denial contained in said answer. The demurrer aforesaid was overruled and defendants given leave to file an amended answer. In so far as this record shows, no attack was ever made upon the general denial contained in said answer, and the same remains intact. All the issues material herein were there raised by that general denial. The leave given by the court to file an amended answer seems to have been given only in so far as the affirmative defenses were concerned. The general denial does not seem to have been affected and still remains on file.

In conclusion, we respectfully submit that a careful perusal of all the evidence in this case fails to disclose any showing whatever upon the part of

plaintiff of any damage to his property, to wit, the mining claim, by reason of the removal therefrom of the timber, and that consequently he failed in the most essential element of his case; and we respectfully submit that judgment herein ought to be affirmed.

Dated, San Francisco,  
October 22, 1915.

Respectfully submitted,

T. C. WEST,

FERNAND DE JOURNEL,

HENRY RODEN,

*Attorneys for Defendants in Error.*

No.

2485

10

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. E. GLASS, Plaintiff in Error. ror,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

## TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for  
the Western District of Washington, Northern Division.

Filed

SEP 17 1914

F. D. Monckton,





No. \_\_\_\_\_

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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W. A. RIDGWAY AND R. E. GLASS, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

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## TRANSCRIPT OF RECORD

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Upon Writ of Error to the United States District Court for  
the Western District of Washington, Northern Division.

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## INDEX OF PRINTED TRANSCRIPT OF RECORD

	Page
Arraignment and Plea .....	29
Assignment of Error .....	35
Bill of Exceptions .....	48
Citation (Copy) .....	95
Citation (Original) .....	84
Certificate of Clerk U. S. District Court to Transcript of Record, etc. ....	92
Certificate of Clerk to Original Exhibits.....	88
Demurrer to Indictment .....	20
Indictment .....	3
Instructions, Proposed, in Bill of Exceptions.....	56
Instructions of Court in Bill of Exceptions.....	61
Names and Addresses of Counsel .....	1
Opinion on Demurrers .....	23
Order Overruling Demurrer as to Certain Counts.....	28
Order Allowing Writ of Error .....	81
Order Settling Bill of Exceptions .....	81
Order to Transmit Original Exhibits .....	86
Order Extending Time to Transmit Record to Circuit Court of Appeals .....	89
Order Extending Time to Transmit Record to Circuit Court of Appeals .....	90
Order as to Exhibits not being printed .....	87
Petition for Writ of Error .....	34
Sentence of R. E. Glass .....	30
Supersedeas Bond of R. E. Glass .....	31

## B

Summons and Severance .....	33
Stipulation as to Record and Exhibits .....	90
Stipulation as to Exhibits not being printed .....	87

### TESTIMONY ON BEHALF OF PLAINTIFF:

Buck, Carrie M. ....	55
Behrans, Adolph .....	54
Giesy, H. ....	55
Luman, Ira C. ....	55
McCash, ——— .....	53
Salzer, ——— .....	52
Stokes, C. A. ....	53
Spicher, George .....	55
Young, David .....	54
Verdict .....	29
Writ of Error (Copy) .....	83
Write of Error (Original) .....	94

In the District Court of the United States for the Western  
District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

---

NAMES AND ADDRESSES OF COUNSEL

F. E. HAMMOND, Esq.,

Attorney for Plaintiff in Error, 602 Mutual Life  
Building, Seattle, Washington.

CLAY ALLEN, Esq.,

Attorney for Defendant in Error, Room 310 Federal  
Building, Seattle, Washington.





United States District Court, Western District of Wash-  
ington, Northern Division.  
No. 2168

The United States of America, Western District of Wash-  
ington—ss.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

---

INDICTMENT.

MAY TERM, 1912.

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Western District of Washington, upon their oaths present:

That heretofore, to-wit: On or about the 13th day of April, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called "Jovita Land Company," and which said circular was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said circular so far as can be represented and set forth herein, and omitting therefrom certain pictures and designs, was as follows:

## “JOVITA’S TWELVE HOUSES.

---

### ATTRACTIVE HOUSES NOW BEING BUILT FOR TWELVE FORTUNATE LOT BUYERS.

---

Few suburban homes in the Sound country are the equal of Jovita’s magnificent \$10,000 house, interior views of which are shown herewith. It was built without regard to cost and contains every modern convenience.

There are 12 commodious rooms, and an 8-foot basement extends beneath the entire house. In every bedroom are marble stationary washstands. The plumbing is complete in all respects, and the water pressure is ample.

Bookcases and sideboards are built-in. A number of the bedroom closets are as large as ordinary rooms. The ballroom on the second floor is big enough for pretentious private dances. The pantry and kitchen arrangements are perfect. There is even an automatic fuel-lift from the basement.

This house, together with two acres of ground, is being sold for \$130. So are the eleven other brand-new houses now in course of construction, each on a specially sightly lot. Several of the new houses are already completed, and all will be finished this summer. Each one of them is a desirable residence, suitable for the requirements of people of taste.

The company is spending over \$30,000 on improvements at Jovita, and all visitors wax enthusiastic over what is being accomplished. Jovita is unquestionably the most attractive suburb between Seattle and Tacoma. It is not remarkable under the circumstances that the sale of Jovita lots is beating all speed records, and it will be only a short time until every one of them is on contract.



## JOVITA LAND CO.

## Offices

Seattle, Wash.

Tacoma, Wash.

Chicago

Minneapolis, Minn.

St. Paul, Minn.

Butte, Mont.

Fargo, No. Dakota.

Missoula, Mont.

MAIN OFFICE 219-220 Epler Block, SEATTLE, WASH."

and which said circular was contained in a certain sealed envelop, then and there addressed and directed as follows, to-wit:

"Carrie M. Buck,  
212 S. Washington St.,  
Centralia, Wash."

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

"Return in five days to  
JOVITA LAND CO.  
Main Office  
219-220 Epler Block  
Seattle, Washington."

and which said scheme hereinbefore referred to was as follows:

That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Land Company, a corporation, certain vacant, unimproved lands within King County, in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita; which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon twelve of said lots, thereby rendering said lots of more value than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of One Hundred and Thirty (\$130.00) Dollars each, but at the time of such sale the lot or lots so purchased should not be identified, but after all of said lots were so sold and contracted to be sold, a drawing should

be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees, and that after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 12th day of June, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called "Jovita Land Company," and which said letter was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

### "PAYMENT NO. 4

Seattle, Wash.

M— Carrie M. Buck,  
212 S. Washington Ave.,  
Centralia, Wash.

The next monthly payment of Ten Dollars on your Jovita Lot will be due on June 16th, 1909, and is payable at our main office, 219 Epler Block, Seattle, Wash.

Kindly remit by check, postoffice money order or express money order. Yours truly,

JOVITA LAND COMPANY."



and which said letter was contained in a certain sealed envelope, then and there addressed and directed as follows, to-wit:

“M— Carrie M. Buck,  
212 S. Washington Ave.,  
Centralia, Wash.”

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“Return in five days to  
JOVITA LAND CO.  
Main Office  
219-220 Epler Block  
Seattle, Washington.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this second count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

### COUNT III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 2nd day of May, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said City of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter and receipt concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called “Jovita Land Company,” and which said letter and receipt were



then and there intended for the purpose of promoting aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

SEATTLE, WASH.

May 2, 1910.

“Mr. Ira C. Luman,  
Centralia, Washington.

Dear Sir:

Herewith please find our Final Clearance Receipt No. 1066 in return for your remittance of \$10.00 covering last payment on your Jovita lot.

Thanking you, we are,

Yours very truly,

JOVITA LAND COMPANY,

Dict. EP/MP.

By E. L. P.”

and which receipt, as near as the same can be set out in this indictment, was in words and figures as follows:

“ORIGINAL

JOVITA LAND CO.

Main Office 219-220 Epler Block,  
Seattle, Washington.

#### FINAL CLEARANCE RECEIPT

THIS IS TO CERTIFY That we have received from Ira C. Luman, Centralia, Wash., ONE HUNDRED AND THIRTY DOLLARS (\$130.00) in full payment for One Lot in JOVITA, King County, Washington, situated between Seattle and Tacoma on the Puget Sound Electric Ry. Interurban, as purchased by him upon the terms and conditions set forth in his application to purchase same.

Signed JOVITA LAND CO.

No. 1066      May 2, 1910, 190      By R. E. Glass, Manager  
R”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and

including the words, "conveying to him the lot or lots so drawn by him" in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this third count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

#### COUNT IV.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 23rd day of June, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called "Jovita Land Company" and which said letter was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

"SEATTLE, WASH.

June 20, 1910.

Dear Sir or Madam:

The representative of Jovita lot-buyers from your locality who is to attend the lot buyers meeting at Jovita, Wash., July 1, 1910, is

Geo. D. James,  
607 Walnut St.

Herewith you will find a proxy form. You may fill out the proxy and sign it in favor of the above named representative if you are personally unable to attend the meeting. Hand or mail it to him.

Yours very truly,  
JOVITA LAND CO.



and which said letter was contained in a certain sealed envelop, then and there addressed and directed as follows, to-wit:

“Mr. Ira C. Luman,  
Centralia, Wash.”

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“JOVITA LAND CO.  
Main Office 219-220 Epler Block  
Seattle, Wash.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this fourth count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

#### COUNT V.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 19th day of April, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain receipt concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called “Jovita Land Company,” and which said receipt was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said receipt, as near as the same can be set out in this indictment, was in words and figures as follows:



## “ORIGINAL

## JOVITA LAND CO.

Main Office 219-220 Epler Block  
Seattle, Washington.

## RECEIPT NO. 2

THIS IS TO CERTIFY That we have received from G. A. Salzer \$10.00 as 2nd payment on one lot in Jovita, King County, Washington, situated between Seattle and Tacoma on the Puget Sound Electric Ry. Interurban.

We hereby agree to deliver to said purchaser a Final Clearance Receipt as soon as One Hundred and Thirty Dollars (\$130.00) the entire purchase price, shall have been paid in full, as set forth in his application to purchase said lot in Jovita, King County, Washington.

Signed, JOVITA LAND CO.

By R. E. Glass, Manager  
B Agent.”

Apr 19 1909 190

and which said receipt was contained in a certain sealed envelop, then and there addressed and directed as follows, to-wit:

“Mr. G. A. Salzer,  
Centralia, Wash.”

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“Return in five days to  
JOVITA LAND CO.  
Main Office  
219-220 Epler Block  
Seattle, Washington.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words, “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this fifth count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## COUNT VI.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 17th day of March, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter and receipt concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called "Jovita Land Company" and which said letter and receipt were then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

"SEATTLE, WASH.

Mr. G. A. Salzer,  
Centralia, Wash.

Mar. 17, 1910.

Dear Sir:—

Herewith please find our Final Clearance Receipt No. 479 in return for your remittance of \$10.00 covering last payment on your Jovita lot.

We still have a large force of men at work finishing up the improvements at Jovita but just as soon as this work can be completed, will give all of our lot buyers thirty days notice of the exact date on which the property will be turned over to them, and this will be just as much before the furthestmost guaranteed date of July 1, 1910, as we can possibly get everything in readiness.

Thanking you, we are,

Yours very truly,

JOVITA LAND CO.

Dict. E/P.

By E. L. P''

and which said receipt, as near as the same can be set out in this indictment, was in words and figures as follows:

“Original

JOVITA LAND CO.

Main Office 219-220 Epler Block  
Seattle, Washington.

FINAL CLEARANCE RECEIPT

THIS IS TO CERTIFY That we have received from G. A. Salzer, Centralia, Wash., One Hundred and Thirty Dollars (\$130.00) in full payment for one lot in Jovita, King County, Washington, situated between Seattle and Tacoma on the Puget Sound Electric Ry. Interurban, as purchased by him upon the terms and conditions set forth in his application to purchase same.

Signed, JOVITA LAND CO.

By R. E. Glass, Manager

No. 479 Mar 17 1910 190

R”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4 of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this sixth count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VII.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: On or about the 23rd day of October, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western



District of Washington, by a certain corporation called "Jovita Land Company," and which said letter was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

"SEATTLE, WASH.

Oct. 23, 1909.

MESSRS. Geo. SPEICHER & H. GIESY,  
Menlo, Wash.

Dear Sirs:—

Your valued application of Oct. 21st and first payment of \$10.00 of a lot in Jovita has been duly received at this office through Mr. V. M. Bullard. We will mail all communications regarding same to you C/o Mr. R. V. McCash, according to instructions from Mr. Bullard.

The unusual advantages afforded at Jovita have undoubtedly been explained to you, but we might add that a better real estate proposition is not being offered anywhere in this Sound country for the amount of money involved, and the improvements we are putting on this property are increasing its value every day. We have a large force of men at work at the present time and are making rapid progress with our improvements.

Yours very truly,

JOVITA LAND COMPANY,

Dict. E/P.

By E. P."

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, "That the said W. A. Ridgway and R. E. Glass should acquire," in lines 19 and 20 on page three, to and including the words "conveying to him the lot or lots so drawn by him" in lines 11 and 12 on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this seventh count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

#### COUNT VIII.

And the grand jurors aforesaid, upon their oaths aforesaid do further present:

That heretofore, to-wit: On or about the 8th day of August, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Tacoma, County of Pierce, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Tacoma, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington, by a certain corporation called "Jovita Land Company," and which said letter was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

"154

Payments Nos. 9, 10, 11 & 12 delinquent.

Payment No. 13

Tacoma, Wash., August 8th

Mr. John Simmons,  
Box 198, Route 1,  
Puyallup, Wash'n.

The next monthly payment of Ten Dollars on your Jovita lot will be due on August 10th, and is payable at our main office, 306-307 Bankers Trust Bldg., Tacoma, Wash.

Kindly remit by check, postoffice money order, or express money order.

Yours truly,

JOVITA LAND COMPANY.

Please return this notice  
with your remittance."

and which said letter was contained in a certain sealed envelop then and there addressed and directed as follows, to-wit:

"Mr. John Simmons,  
Box 198, Route 1,  
Puyallup, Wash'n."

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“JOVITA LAND CO.  
306-307 Bankers Trust Bldg.  
Tacoma, Wash.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words, “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this eighth count; contrary to the form of statute in such case made and provided, and against the peace and dignity of the United States of America.

#### COUNT IX.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit On or about the 8th day of July, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington, by a certain corporation called “Jovita Land Company,” and which letter was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:



“SEATTLE, WASHINGTON.

July 5, 1910.

“Mr. John Simmons,  
Puyallup, Wash.

Dear Sir:—

The Trustees of the Jovita lot-buyers awarded you Lot 25 Block 83 in Jovita, at the meeting of Jovita lot-buyers held on the property July 1, 1910.

You may continue to pay at the rate of \$10.00 a month, and will receive your deed and abstract as soon as you complete the thirteen payments.

Or if you care to pay the balance due, the deed and abstract will come forward to you by return mail.

Plats of the property are made a part of every abstract of title, so every lot buyer will receive one.

Yours very truly,

JOVITA LAND COMPANY.”

and which said letter was contained in a certain sealed envelop then and there addressed and directed as follows, to-wit:

“Mr. John Simmons,  
Box 198, Route 1,  
Puyallup, Wn.”

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“JOVITA LAND CO.

Main Office, 219-220 Epler Block,  
Seattle, Wash.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this ninth count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## COUNT X.

And the grand jurors aforesaid, upon their oaths aforesaid, do furtehr present:

That heretofore, to-wit: On or about the 14th day of April, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Tacoma, County of Pierce, State of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Tacoma, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington, by a certain corporation called "Jovita Land Company," and which letter was then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which letter, omitting the letter head, was in words and figures as follows:

"Tacoma, Washington, April 14, 1910.

Dear Sir:

The improvements on the Jovita townsite, as agreed between the Jovita Land Company and its contract holders, are now nearing completion.

The Jovita property will be turned over to the lot buyers on or before July 1st, 1910, with free warranty deeds and abstracts of title for each lot and tract.

The Company has spent \$45,000.00 on improvements up to date, and will have all of the improvements completed within sixty days. A large force of men and teams have been constantly employed at this work for fourteen months.

All lot buyers will be given thirty days notice of the exact date of the meeting, which will be held at Jovita, Washington.

Yours very truly,

JOVITA LAND COMPANY,

By R. E. Glass."

and which said letter was contained in a certain sealed envelop then and there addressed and directed as follows, to-wit:

“Mr. John Simmons,  
2832 East I St.,  
Tacoma.”

and upon said envelop in the upper left hand corner thereof, among other things, appeared the words and figures:

“JOVITA LAND CO.  
306-307 Bankers Trust Bldg.,  
Tacoma, Wash.”

and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words, “That the said W. A. Ridgway and R. E. Glass should acquire” in lines 19 and 20 on page three, to and including the words “conveying to him the lot or lots so drawn by him” in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this tenth count; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. G. McLAREN,  
United States Attorney.

Witnesses examined before grand jury:

G. A. Salzer, Geo. D. James, Carrie M. Buck; Ira Luman, Geo. Speicher.

(Endorsed): Indictment for Vio. Section 213 Penal Code. A True Bill. Clarence Hanford, Foreman Grand Jury. Filed May 20th, 1912. A. W. Engle, Clerk. F. A. Simpkins, Deputy. Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court, May 20, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.



United States District Court, Western District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

### DEMURRER TO INDICTMENT

Now comes W. A. Ridgway and R. E. Glass in their own proper person in Court, and say:

#### I.

(a) That said indictment and the matters and things contained in Count I thereof, and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass are not bound by the law of the land to answer the same, and this they are ready to verify:

(b) That said indictment on said count was not found nor the prosecution instituted within three years next after said offence is alleged to have been committed.

#### II.

That said indictment and the matters and things contained in Count II thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify.

#### III.

That said indictment and the matters and things contained in Count III thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the

law of the land to answer the same, and this they are ready to verify.

#### IV.

That said indictment and the matters and things contained in Count IV thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify.

#### V.

(a) That said indictment and the matters and things contained in Count V thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify;

(b) That said indictment on said count was not found nor the prosecution instituted within three years next after said offense is alleged to have been committed.

#### VI.

That said indictment and the matters and things contained in Count VI thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgeway and R. E. Glass are not bound by the law of the land to answer the same, and this they are ready to verify.

#### VII.

That said indictment and the matters and things contained in Count VI thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass are not bound by the law of the land to answer the same, and this they are ready to verify.

## VIII.

That said indictment and the matters and things contained in Count VIII thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify.

## IX.

That said indictment and the matters and things contained in Count IX thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify.

## X.

That said indictment and the matters and things contained in Count X thereof and in said Count contained in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same, and this they are ready to verify.

WHEREFORE, for want of sufficient indictment in this behalf, the said W. A. Ridgway and R. E. Glass pray judgment and that by the Court they may be dismissed and discharged from each and every of the counts of said indictment aforesaid, and from said indictment and from said premises in the said indictment and the several counts thereof specified.

KERR & McCORD,

HAMMOND & HAMMOND,

Attorneys for Defendants.

Service of within Demurrer and receipt of copy admitted this 25th day of June, 1912. M. G. McLaren, Attorney for Plaintiff.

Indorsed: Demurrer. Filed in the U. S. District Court, Western District of Washington, June 27, 1912, A. W. Engle, Clerk. By S., Deputy.



In the District Court of the United States, Western District  
of Washington, Northern Division.

Nos. 2168 and 2169. Opinion on Demurrers.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

This matter is now before the court upon demurrers to the indictments in the above numbered causes.

The first count of the indictment in cause No. 2169, is as follows, to-wit:—

“That heretofore, to-wit: On or about the 9th day of April, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, County of King, State of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office in the United States of America, at said City of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter and circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called “Jovita Heights Company”, and which said letter and circular were then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows: \* \* \* and which said letter and circular were contained in a certain sealed envelop, then and there addressed and directed as follows, to-wit: \* \* \*.

“That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Heights Company, a corporation, certain vacant, unimproved lands within King County in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita Heights; which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon twenty-four of said lots thereby rendering said lots of more value

than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of One Hundred and Forty (\$140.00) Dollars each, but at the time of such sale the lot or lots so purchased should not be identified, but after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees, and that after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The other counts are of similar import, but are based upon and describe different letters and circulars as the subject matter of the mailing. There are eleven counts in the indictment in cause No. 2169 and ten counts in indictment No. 2168.

The indictments not only embrace charges of violations of Section 3894 R S., but of Section 213 of the Criminal Code of 1910. The plaintiff admits that prosecution for any offenses charged in counts I to V in indictment No. 2168 is now barred by the Statute of Limitations.

The first point urged in defendants' demurrer is that the only count in this indictment which sets forth and describes the "scheme" is the first count. The other counts incorporating the allegations describing the "scheme" by reference to the first count, and the first count being barred by the statute, the others fall with it.

This position cannot be sustained.

"One count may refer to matter in a previous count, so as to avoid unnecessary repetition; and if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter coming before with that in the count in which the reference is made. *Litz v. U. S.*, 153 U. S. 308-317."

*Crain vs. U. S.*, 162 U. S., 625.  
40 Law Edition, 1097-1099.



It is further urged that the indictments are demurable for the reason that there is an improper joinder of offenses in that counts I., II., V. and VII. of indictment 2168 are under Section 3894 R. S., providing a maximum imprisonment of one year and the remainder of said counts are under Section 213 of the Criminal Code, providing a maximum imprisonment of two years, it being contended that a felony and misdemeanor cannot be joined in the same indictment.

Section 213 of the Criminal Code of 1910 supersedes Section 3894 of the Revised Statutes. They treat of the same offenses, to-wit: Using the mails in furtherance of a lottery or similar scheme. Section 213 is somewhat more comprehensive than Section 3894. The offenses described are not only of the same class, but they cover the same ground.

Section 1024 of the Revised Statutes provides:—

“Where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, *or for two or more acts or transactions of the same class of offenses or crimes, which may be properly joined*, instead of having several indictment, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.”

See also,

*Encyc. Pl. and Pr.*, vol. 10, p. 550.  
22 *Cyc.*, 402 and cases cited.

Supporting the text of the latter, *U. S. v. Spintz* is cited, 18 Fed., 277, in which decision it is said:—

“Counts in an indictment under Sections 3922 and 3924 Revised Statutes may be properly joined under Section 1024, although the former be a misdemeanor and the latter a felony.”

The next objection made is that there is no sufficient sienter; that it is not charged that the defendants knew that the letter deposited was concerning a “scheme” offering prizes. A demurrer was, by this court, sustained to a former indictment against these parties which charged that the defendants “did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited



in the post office of the United States of America a certain sealed envelop \* \* \* and contained within said envelop was a letter”—the court holding that this was not a sufficient allegation that the letter was knowingly mailed.

The charge in the present indictment is that the defendants “did then and there wilfully, knowingly, unlawfully and feloniously deposit \* \* \* a certain letter and circular concerning a certain scheme”. This is a sufficient charge that the defendants knew that the letter deposited by them concerned the scheme and, as it is charged that the defendants devised this scheme, it cannot but be presumed that they knew its nature.

It is further objected that the indictment falls short of charging the necessary sienter in another particular. That portion of the statute involved in this case—Section 213 of the Criminal Code of 1910—condemns the sending of a letter concerning “a lottery \* \* \* or similar scheme offering prizes, dependent in whole or in part upon lot or chance.” Section 3894 reads “other similar enterprise offering prizes, dependent upon lot or chance.”

In the opening of each count of the indictments, the defendants are charged with having knowingly deposited in the post office a letter “concerning a certain scheme dependent upon lot or chance.”

The objection made is that the language does not cover the statute; that “a scheme dependent upon lot or chance” is not “a scheme offering prizes dependent upon lot or chance.” If the language quoted is unaided by any other language in the indictments, the objection is good and the indictments are defective; but the first count closes as follows: “and which said certain scheme hereinbefore referred to was as follows:— \* \* \*”—then proceeds to describe the scheme as above set out. The counts other than the first conclude:—“and which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words \* \* \*.”

With this express reference to the “scheme” mentioned in the last part of each count, it will be sufficient to cure the loose language used in the beginning of the count, provided the scheme described in closing the count is one “offering prizes dependent in whole or in part upon lot or chance.”

This brings us to the final objection urged by the defendant, which is decisive of both questions, that is:—It is

contended that, in the "scheme" as described, no prizes are offered dependent upon lot or chance.

By the indictment above quoted it is charged that the lands to be acquired by the defendants were to be platted and the lots were to be of unequal value, and, upon a certain number of them, houses were to be erected, rendering the inequality in value still greater. The lots were to be then sold at One Hundred Forty Dollars each; but the lot secured was not to be known or identified at the time of the purchase. After all were sold, there was to be a drawing, under the supervision of the defendants, but which the lots were to be parcelled out by lot or chance to each purchaser and thereafter deeded to each, in accordance with the drawing.

This arrangement was, certainly, a scheme similar in all respects to a lottery. If, in place of lots of land, there were to be taken a large number of envelopes, mostly empty, but into twenty-four of which money was placed and chances on the drawing of the envelopes sold at One Dollar a chance, the fact that it was such would be more clearly apparent; but the principle of the scheme would be the same.

It may be, as contended by counsel for defendants, that, after the purchase of lots, there is no law against the owners apportioning the property by drawing lots. Among other cases cited, as supporting the demurrer, is that of the Clancy Park Land Co. vs. Hart, 73 N. W., 1059. In that case the court expressly pointed out that, "without a scheme or plan to distribute by chance on the part of the promoters, the vital part of the lottery was lacking."

In the case at bar, it is charged that there was such a scheme on the part of the promoters, the defendants—a scheme not devised after the purchase of the property in common, to identify and segregate the holdings of the owners, but a scheme devised in advance, presumably to stimulate the gambling instinct and induce the buyers to take a hazard, in hopes of a reward largely in excess of the investment.

The demurrers are overruled, save as to counts I. to V. above indicated.

EDWARD E. CUSHMAN,  
District Judge.

Indorsed: Opinion on Demurrers. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 15, 1912. A. W. Engle, Clerk. By S., Deputy.



United States District Court, Western District of Washington,  
Northern Division.

No. 2168. Order.

UNITED STATES OF AMERICA, Plaintiff,

VS.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

The above entitled matter having heretofore come regularly on for hearing on the Demurrer of the defendants to the indictment, the Court having heretofore filed its written opinion on said demurrer, and said opinion containing an obvious clerical error on page 2 thereof, wherein it is stated that the plaintiff admits the prosecution for the offenses charged in counts one "to" five, as barred by the statute of limitations, whereas it plainly appears from the files only counts one and five were barred by the Statute, or admitted to be so barred, and the opinion stating that the demurrer should be overruled as to all other matters, and no formal order having been heretofore entered, now therefore,

IT IS HEREBY ORDERED, That said demurrer be and the same hereby is overruled as to all the counts therein, except counts one and five, and that the said demurrer be sustained as to counts one and five, and that an exception be allowed the defendants, and each of them, to the overruling of said demurrer to each of said counts as to which it is so overruled.

Dated this 17th day of June, 1913.

EDWARD E. CUSHMAN,  
Judge.

Indorsed : Order Filed in the U. S. District Court  
Western District of Washington, June 17, 1913. Frank L.  
Crosby, Clerk. By E. M. Lakin, Deputy.



In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

### ARRAIGNMENT AND PLEA

Now on this day into open Court comes the said defendants W. A. Ridgway and R. E. Glass for arraignment, and being asked if the names by which they are indicated are their true names, each replies, "It it." Whereupon the reading of the indictment is waived and both defendants here and now enter their plea of not guilty to the charge in the indictment herein against them, Earl B. Brockway appearing for the Plaintiff and Kerr & McCord and Hammond & Hammond appearing for the defendants.

Dated June 19, 1913.

Journal 3. Page 170. U. S. District Court.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

### VERDICT

We, the jury in the above entitled cause find the Defendant

W. A. Ridgway is guilty of Count II.

W. A. Ridgway is guilty of Count III.

W. A. Ridgway is guilty of Count IV.

W. A. Ridgway not guilty of Count VI.

W. A. Ridgway is guilty of Count VII.

W. A. Ridgway not guilty of Count VIII.  
W. A. Ridgway not guilty of Count X.

## AND

R. E. Glass is guilty of Count II.  
R. E. Glass is guilty of Count III.  
R. E. Glass is guilty of Count IV.  
R. E. Glass not guilty of Count VI.  
R. E. Glass is guilty of Count VII.  
R. E. Glass not guilty of Count VIII.  
R. E. Glass not guilty of Count X.

Jacob Anthes, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court,  
Western Dist. of Washington, Dec. 24, 1913. Frank L.  
Crosby, Clerk. By E. M. L. Deputy.

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In the District Court of the United States for the Western  
District of Washington. Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

## SENTENCE OF R. E. GLASS

Comes now on this 27th day of December, 1913, the said Defendant R. E. Glass, into open Court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said.

Wherefore, by reason of the law and the premises, it is considered by the Court, that the said Defendant, R. E. Glass, be punished by being imprisoned in the King County Jail, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of sixty days on each count, each sentence to run concurrently in all counts, at hard labor, from and after this date. And that he pay a fine of \$300.00 on each count, totaling \$1,200.00, and

that execution issue therefor, and that he be further imprisoned in the said King County Jail until such fine is paid, or until he shall be otherwise discharged by due process of law.

And the said Defendant, R. E. Glass, is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree Book 1, Page 392.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

### SUPERSEDEAS BOND OF R. E. GLASS

KNOW ALL MEN BY THESE PRESENTS: That we, R. E. Glass, as Principal, and C. J. Gerald and E. M. Brouillette, as sureties, are held, and firmly bound unto the United States of America, in the full and just sum of Thirty Five Hundred and no/100 (\$3,500.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 27th day of December, A. D. 1913.

THE CONDITION of this obligation is such; that

WHEREAS, Lately in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in such court between the said United States of America as Plaintiff, and the said R. E. Glass as Defendant a judgment was rendered against the said R. E. Glass, and the said R. E. Glass having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the afore-said suit, and a Citation directed to Clay Allen, as United States District Attorney in the above entitled cause, citing



and admonishing him to be and appear at a session of the Circuit Court of Appeals of the United States for the Ninth Circuit, to be holden at the City of San Francisco on the 4th day of May, next.

NOW THEREFORE, if the said R. E. Glass shall prosecute the said Writ of Error to effect, and shall abide the decree and judgment of the Circuit Court of Appeals and any and all further orders and judgment entered herein, and shall pay the fine imposed by the Court in case said judgment is affirmed by said Circuit Court of Appeals, then the above obligation to be void, else to remain in full force and effect.

R. E. Glass.....Seal  
Principal.

C. J. Gerald.....Seal  
Surety.

E. M. Brouillette.....Seal  
Surety.

O. K.

Allen, Atty. for plaintiff.

Approved 12/27/13.

Jeremiah Neterer,  
Judge.

United States of America, Western District of Washington, Northern Division: ss.

C. J. Gerald and E. M. Brouillette each being first duly sworn, each on oath for himself does say:

I am a resident of King County, Washington, and am worth the sum of Thirty Five Hundred Dollars (\$3500.00) in property within this State, over and above all debts and liabilities and exclusive of property exempt from execution.

(SEAL)

C. J. Gerald  
E. M. Brouillette.

Subscribed and sworn to before me this 27th day of December, A. D. 1913. Ed. M. Lakin, Deputy Clerk U. S. District Court Western Dist. of Washington.

Indorsed: Supersedeas Bond of R. E. Glass Filed in the U. S. Dist. Court Western District of Washington, Northern Division Dec. 27, 1913. Frank L. Crosby, Clerk, by E. M. L. Deputy.

In the United States District Court for the Western  
District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

SUMMONS AND SEVERANCE.

To W. A. RIDGWAY and J. A. KERR, his Attorney:

You are hereby invited to join with me, on or before the 4th day of February, A. D. 1914, to prosecute a Writ of Error in the above entitled cause, returnable to the United States Circuit Court for the Ninth Circuit, to reverse the judgment in the above entitled cause rendered against us jointly, on the 24th day of December, A. D. 1913, or you will be deemed to have acquiesced in the said judgment, and I shall prosecute said Writ of Error without joining you as a party.

R. E. Glass.

By F. E. Hammond,

His Attorney.

Service of the above is accepted this 15th day of January, A. D. 1914.

W. A. Ridgway

By Kerr & McCord,

His Attoreny.

Indorsed: Summons and severance. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 16, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western  
District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

AT LAW. PETITION FOR WRIT OF ERROR.

To the Honorable Jeremiah Neterer, Judge of the United  
States District Court for the Western District of  
Washington, Northern Division:

Comes now the above named defendant and petitioner,  
R. E. Glass, by his Attorney, F. E. Hammond, and res-  
pectfully shows:

That on the 24th day of December, A. D. 1913, a jury,  
duly empaneled in the above numbered and entitled cause,  
found a verdict of guilty against your petitioner, on the  
charge made against him in the Second, Third, Fourth  
and Seventh counts in the indictment on file herein; That  
thereafter, on to-wit: the 27th day of December, A. D.  
1913, final judgment was made and entered herein, whereby  
it was adjudged that your petitioner, pay a fine of Three  
Hundred (\$300.00) Dollars upon each of said four counts  
in said indictment, and serve a term of sixty (60) days  
upon each of said four counts, in the County Jail of King  
County, Washington, said jail sentence to be served con-  
currently.

That on said judgment and the proceedings had prior  
thereunto in this cause certain errors were committed to  
the prejudice of your petitioner, all of which will more in  
detail appear from the assignment of errors which is filed  
with this petition.

Your petitioner, feeling himself aggrieved by said ver-  
dict and judgment entered thereon as aforesaid, herewith  
petitions this Honorable Court for an order allowing him  
to prosecute a Writ of Error to the United States Circuit  
Court of Appeals for the Ninth Circuit, under the laws  
of the State of Washington in such cases made and pro-  
vided.



WHEREFORE, Your petitioner prays that a Writ of Error issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

F. E. Hammond.

Attorney for Petitioner in Error, R. E. Glass.

Service of copy of the foregoing petition is hereby admitted this 16th day of Feb., A. D. 1914.

Clay Allen,  
United States District Attorney.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 16, 1914, Frank L. Crosby, Clerk. By E. M. L. Deputy.

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In the United States District Court for the Western  
District of Washington, Northern Division.

No. 2168

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

### ASSIGNMENTS OF ERROR.

Comes now the above named defendant, R. E. Glass, by his Attorney, and in connection with his petition for writ of error herein, makes the following assignments of error, and particularly specifies the following as the errors upon which he will rely and which he will urge upon the prosecution of his said writ of error in the above numbered and entitled cause, and which he avers are shown in the record, proceedings and judgment in the above entitled cause, and which occurred upon the hearing and trial thereof, to-wit:

## THE COURT ERRED:

## I.

In overruling the demurrer of said defendants to the indictment filed against them in this cause.

## II.

In holding and deciding over the objections of said defendants, that said indictment states facts sufficient to constitute a crime or offense against the United States or the laws thereof.

## III.

In holding and deciding over the objections of said defendants, that the several counts of said indictment, or that any of said counts states facts sufficient to constitute a crime or offense against the United States or the laws thereof.

## IV.

In holding and deciding over the objections of said defendants, that said indictment was sufficient in law.

## V.

In holding and deciding over the objections of said defendants, that counts 2, 3, 4, 6, 7, 8, 9 and 10 of said indictment were sufficient in law, and in holding that any of said counts were sufficient in law.

## VI.

In holding and deciding over the objection of said defendants, that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against said defendants, and permitting over the objections of said defendants, evidence to be introduced thereunder against said defendants as to counts 3 and 4, after the introduction of evidence as to count 2 of said indictment.

## VII.

In overruling the objections of said defendants to the introduction of evidence, and in admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 23, purporting to be a letter from the Jovita Land Company to Carrie M. Buck, and being the letter mentioned in

plaintiff's count 2 as having been unlawfully deposited in the United States Post Office Establishment, contrary to law; said letter being in words, letters and figures as follows, to-wit:

"Payment No. 4

Seattle, Wash.,

M— Carrie M. Buck,  
212 S. Washington Ave.,  
Centralia, Wash.

The next monthly payment of Ten Dollars on your Jovita Lot will be due on June 16th, 1909 and is payable at our Main Office, 219 Epler Block, Seattle, Wash.

Kindly remit by check, postoffice money order or express money order.

Yours truly,

JOVITA LAND COMPANY."

#### VIII.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 63, the same having been offered after the introduction in evidence of Exhibit No. 23 and Exhibit No. 25; said Exhibits No. 23 and No. 25 being letters alleged to have been deposited in the United States Post Office Establishment, contrary to law, and set forth in the indictment as counts 2 and 7 respectively, said counts 2 and 7 being founded upon the law as in force prior to January 1st, 1910, and count 3 of said indictment being founded upon the law as in force after January 1st, 1910. Said Exhibit No. 63 purporting to be a letter and receipt from the Jovita Land Company, and being the letter and receipt set forth in count 3 of the indictment, as having been unlawfully deposited in the Post Office Establishment of the United States.

#### IX.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, of plaintiff's Exhibit No. 25, the same purporting to be a letter from the Jovita Land Company to George Spicher and H. Geisy, and being the letter set forth in count 7 of said Indictment, and



alleged to have been unlawfully deposited in the Post Office Establishment of the United States.

### X.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, plaintiff's Exhibit No. 60, the same purporting to be a letter from the Jovita Land Company, bearing no address, but alleged to have been contained in an envelope addressed to Ira G. Luman, said Exhibit No. 60 being set forth in count 4 of the indictment, and alleged to have been unlawfully deposited in the Post Office Establishment of the United States.

### XI.

In giving the following as part of its instructions:

"In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their acts by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and handed to a trustee before the drawing, and that the defendants took no part in such drawing."

### XII.

In giving the following as part of its instructions:

"If the defendants devised this scheme for the distribution of the property for the purpose, and with the intention and understanding that people would be attracted by it and would be induced to purchase interests or shares for the reasons among other things that in the drawing by resort to lot at which every contractor or shareholder would have a chance to draw a more valuable piece of property, as well as a smaller piece of property, if you find beyond a reasonable doubt that they did devise and further such plan for such a purpose, and with such intent and understanding, and that such scheme was that described in the indictment, then you may find that they were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though you find they contemplated withdrawing and

did actually withdraw from participation in the enterprise before the drawing was held, and that they took no part in the drawing."

### XIII.

In giving the following as part of its instructions:

"You are further instructed in this connection that every sane person is presumed to intend the natural and logical consequences of his voluntary act; that is, if the defendants or either of them, in the conduct of this service must have contemplated that the United States mail would have to be used in the correspondence with the contracting parties for the purchase of an interest in this land, and that their, or either of their employees under general directions sent out this mail matter as that is described in the indictment, then you would be justified in finding, if the evidence is sufficient to convince you beyond a reasonable doubt, that they did cause those things to be mailed, although they did not direct any one particular piece of mail to be sent to a particular addressee."

### XIV.

In giving the following as part of its instructions:

"If you find that they were trustees in the Jovita Land Company, and executive and managing heads, and exercised an active supervision and control over the corporation's affairs, they would be responsible for any general directions given in relation to the mailing of literature, whether they personally gave the directions to mail or not."

### XV.

In giving the following as part of its instructions:

"Were they in good faith simply selling undivided interest in properties of which they were possessed, with no other inducement to purchasers than the value, or supposed value of the property or the merits thereof, or were they in bad faith, and under cover of legal form, knowingly and in reality appealing to the weakness of the passion prevalent in human nature, the gambling spirit, by which many people are easily induced to invest or to risk comparatively small sums upon the chance of winning a prize of much greater value."



## XVI.

In giving the following as part of its instructions:

“You are instructed that the law does not, as a rule, permit proof to be given of what one man has said or done in order to affect the matter. One can only be affected by what he has said or done himself. What one has said or done cannot be evidence against another unless he was acting with the other’s authority, or in accordance with a plan which was adopted by both the parties which was common to both or all, and in which they ere interested. When a thing which the parties have been doing separately and apart from each other, and in the interest of a common plan or purpose, or if you find that there was a common plan or purpose, can only be explained on the theory that they were acting in pursuance of such plan which they had previously adopted, and which was well understood, it may be found that they had previously adopted the plan disclosed by the evidence and which led to the result as described. One question, therefore, in this case is, whether the acts of the defendants when considered in their relation to one another do fairly and convincingly indicate that they were acting in pursuance of a common plan and purpose, and that the defendants, Glass and Ridgway were acting with relation to such plan, and to the advancement of a common plan and purpose in the advertisement and disposal of the property referred to in the indictment, and concerning which testimony has been received; and if these acts so fit together and match each other that the only reasonable explanation of them is that they were acting for and on behalf of each other and according to a well understood and well defined plan, if you are convinced by the evidence that such is the fact, then you may consider the act or the statement of one in furtherance of such a common plan as you may find, if any, to have been adopted as against the other defendant, whether the other defendant was present at the time of the statement or at the time of the action or not, at the time the statement was made, or at the time that the act was done, or whether they were not.”

## XVII.

In refusing to give the defendants’ proposed Instruction No. 4, which was as follows:

“I instruct you, gentlemen of the jury, that the scheme concerning which the law forbids any letters or circulars to



be deposited in the mails is such a scheme as is similar to a lottery and offering prizes to those who participate in said scheme, the ultimate ownership of which prizes must depend upon lot or chance."

### XVIII.

In refusing to give the defendants' proposed Instruction No. 5, which was as follows:

"I instruct you that any number of persons may buy jointly a tract of land in any condition and subsequently divide it among themselves by drawing lots and the persons selling them the land, even though he knew they intended to divide it by a drawing or otherwise, would not commit a crime if he deposited or caused to be deposited any mail matter relative thereto in the Post Office of the United States similar to that set forth in the indictment in this case."

### XIX.

In refusing to give the defendants' proposed Instruction No. 6, which was as follows:

"I instruct you that in determining whether there was a lottery or other similar scheme of chance devised or carried out; that where two or more persons who are the owners of undivided lots of land determine or arrange to apportion their respective interests therein among themselves, and the plan of so apportioning or dividing the same is by casting lots and thereby ascertain and apportion to each his interest in severalty by chance or lot, this is not a lottery or similar scheme of chance as contemplated by the law, for, the law contemplates that, in a lottery or other similar scheme, the title to the prize or property has not yet passed to the purchaser or person entitled to the chance and that it is by lottery or similar scheme of chance that the purchasers obtain the property or so called prizes, and the law contemplates that the title, at the time of the lottery or other similar scheme of chance was had or held, was in some other than the purchaser or person taking the chance, and that the right which was held by the parties expecting or seeking prizes was merely a right to participate in the lottery or drawing with the understanding or agreement, express or implied, that, thereafter, there would be conveyed or transferred to him the prize or property which might, by reason of such lottery or similar scheme, fall to him by reason of such drawing or scheme. That in all lotteries, or similar

schemes of chance, as defined by law, there must be some party or parties holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance."

## XX.

In refusing to give defendants' proposed Instruction No. 7, which was as follows:

"You are instructed that at the time the Jovita Land Company delivered deeds to the lots buyers all title to the land, houses and other improvements passed from the Jovita Land Company to the lot buyers and the lot buyers were then the absolute owners and entitled to the possession and control of the property; that thereafter all the lot buyers owned an undivided interest in each and every house or part or parcel of land, which included the alleged prizes alleged to have been offered; that upon the delivery of said deeds all control over the subsequent disposition of said property passed from said Land Company, or these defendants, and any purchaser if he wished could have gone into the State Court and had the land partitioned equitably among them or they had the right to divide it among themselves by lot.

## XXI.

In refusing to give defendants' proposed Instruction No. 8, which was as follows:

"You are further instructed that at the time of the execution of each contract of sale of an undivided interest, the purchaser became the owner of an undivided interest in the land, houses and other improvements owned by the Jovita Land Company and as long as the purchaser made his payments the Land Company could not divest him of his title and the purchasers title was as complete in the alleged prizes as in the unimproved land; in other words you are instructed that the purchasers from the time of their purchase at all times owned the alleged prizes as well as the unimproved land and small tracts and these purchasers after obtaining title could lawfully allot their land among themselves as they might agree without any control or interference upon the part of the defendants."



## XXII.

In refusing to give defendants' proposed Instruction No. 9, which was as follows:

"You are further instructed that if the said purchasers had refused to allot their land by lot, chance or drawing, the Jovita Land Company could not have compelled them to hold a drawing, nor could the Jovita Land Company have held any drawing or apportionment that would have been binding upon the lot buyers."

## XXIII.

In refusing to give defendants' proposed Instruction No. 10, which was as follows:

"This brings you to the consideration of the second question, viz: Did the defendants, Ridgway and Glass, devise a scheme in connection with the sale of the land by which a drawing was to be conducted under their supervision, or that of their authorized agents and employees, as charged by the Government; or did the defendants as claimed by them, simply sell to various and sundry persons undivided interests in the land platted by Jovita Land Company, leaving it to the purchasers themselves to partition said lots among themselves as they saw fit? Contracts of sale for said land have been exhibited to you which it is claimed the Land Company executed, which contracts purported by their terms to sell but an undivided interest in the land platted, and which provided further that the several purchasers should meet and partition the land as they saw fit. These contracts further provide that no selling agent has any power to alter or change their terms. The defendants further deny that they or either of them at any time authorized any agents to vary, change or modify the terms of such contracts, and deny any knowledge that any such agent had ever attempted so to do. The defendants further deny that they or either of them had anything whatever to do with any drawing or the division of said lots, and deny that the plan therefor was their plan, or that they supervised it, or that the same was supervised with their knowledge or consent by any agent or employee of their or of said Land Company.

You are accordingly instructed that if you find that defendants did in good faith sell undivided interests in the property platted by said Land Company, and that the plan



of allotment was not their plan, but a plan adopted and carried into effect by the purchasers for the purpose of partitioning the property among themselves, your verdict must be for the defendants."

#### XXIV.

In refusing to give defendants' proposed Instruction No. 10 $\frac{1}{2}$ , which was as follows:

"If, however, on the other hand, you should find that there was a lottery scheme offering prizes and that it was the scheme of the defendants, or either of them, and that they or either of them sold the property to the several purchasers in contemplation that the same would be allotted by chance and that thereafter a drawing was held prior to the transfer of title from the Land Company to the purchasers and that the defendants or either of them arranged and supervised such drawing or caused the same to be done, and that in connection with the sale of said property the defendants, or either of them, within three years prior to May 20, 1912, deposited or caused to be deposited in the United States mails letters and circulars as alleged by the Government for the purpose of furthering and aiding such scheme, then I instruct you the defendants would be guilty of the crime charged, and in this connection I instruct you that the delivery of deeds to the authorized representatives of the purchasers would be the same as a delivery of the deeds to the actual purchasers of the lots."

#### XXV.

In refusing to give defendants' proposed Instruction No. 11, which was as follows:

"I instruct you that unless you can find that the defendants personally deposited the mail matter or directed some one else to do so you must acquit the defendants."

#### XXVI.

In refusing to give defendants' proposed Instruction No. 12, which was as follows:

"You are instructed that it is not a crime to deposit a letter or circular concerning a lottery that has been held. To illustrate: Suppose a lottery has been held and, in writing a letter to a friend or acquaintance you mention the fact that a lottery has been held; you would in that case not be

violating the law although the letter would be in a sense "concerning a lottery". Nor is it a crime to deposit or cause to be deposited a letter concerning a legitimate allotment of land or property among the owners thereof. To illustrate: If the various owners of a tract of land decide to divide it among themselves by a drawing or a casting of lots, that would be a legitimate allotment or lottery, and it would not be a crime to deposit or cause to be deposited in the Post Office a letter or circular concerning such a lottery or plan even though the letter was one which was promoting the scheme or plan of distribution and the tracts of land to be divided were of unequal value."

### XXVII.

In refusing to give defendants' proposed Instruction No. 14, which was as follows:

"I instruct you that the law presumes that the Jovita Land Company and the purchasers intended to carry out their contract in a lawful manner and the government must overcome this presumption by evidence that convinces you beyond a reasonable doubt and it is presumed by law that all parties connected with the sale or purchase of the land believed and contemplated that after the delivery of the deeds the land would be partitioned among them in a legitimate manner."

### XXVIII.

In refusing to give defendants' proposed Instruction No. 18, which was as follows:

"I instruct you that the mere fact that these defendants were officers of the corporation known as the Jovita Land Company is not of itself sufficient to prove that they knew that there was in existence a scheme similar to lottery, being conducted by the Jovita Land Company, nor is it sufficient to prove that they deposited or caused to be deposited the letters or circulars set forth in the indictment."

### XXIX.

In refusing to give defendants' proposed Instruction No. 19, which was as follows:

"The mere reception of the matter, alleged to have been deposited in the mail, by the person to whom it was addressed, would not of itself establish the fact that defend-



ants deposited or caused to be deposited, such matter in the mails.”

XXX.

In refusing to give defendants’ proposed Instruction No. 20, which was as follows:

“You are instructed that if you find from the evidence that at or about the time the Jovita Land Company began the sale of its lots, these defendants, or either of them consulted with lawyers for the purpose of advising them or either of them as to whether or not the sale of land under the contracts in evidence was legal and not in violation of law, and that said defendants, or either of them, were advised by counsel learned in the law that it would not be in violation of law to sell their land under such contracts, and that if the said Land Company and these defendants did not participate in the allotment of the land that neither the company or these defendants would be violating the law, regardless of what the purchasers might do, then and in that case your verdict should be an acquittal of these defendants, or either of them.”

XXXI.

In refusing to give the defendants’ proposed Instruction No. 22, which was as follows:

“I instruct you that the defendants in this case are entitled to the individual opinion of each member of the jury as to their guilt or innocence and if any juror entertains a reasonable doubt as to their guilt of any one of the necessary elements of the crime charged he should not vote for a verdict of guilty merely because any other or other jurors, even a majority of them, believed the defendants guilty.”

XXXII.

In refusing to give defendants’ proposed Instruction No. 24, which was as follows:

“You are instructed that there is nothing contained in the letters or circulars set out in the indictment that is even suggestive of a scheme similar to a lottery offering prizes dependent upon lot or chance, nor on their face are they concerning such a scheme.

Standing alone, by themselves, the defendants would commit no crime by depositing in the mails such letters or



circulars, therefore, you must look to other evidence to determine if the said letters and circulars are concerning a scheme to a lottery, as charged in the indictment.”

### XXXIII.

In refusing to give defendants’ proposed Instruction No. 28, which was as follows:

“I instruct you that if from the evidence or statements of Counsel you have gained the impression that the Jovita Land Company or either of these defendants, lost money or gained money by reason of the alleged transactions, you must entirely disregard it for any purpose for the reason that whether they gained or lost by the transaction has nothing to do with this case; neither does it make any difference whether or not the property sold by the Jovita Land Company was worth the amount it was sold for. There is no charge of fraud in the indictment against these defendants and there is no evidence upon which you would be justified in presuming any fraud.”

### XXXIV.

In pronouncing a judgment against the said defendants, and each of them.

WHEREFORE, said defendant and plaintiff in error, R. E. Glass, prays that the judgment of said Court be reversed, and that the Court be directed to sustain defendants’ demurrer to said indictment, or to grant a new trial of said cause.

F. E. HAMMOND,

Attorney for defendant and plaintiff in error, R. E. Glass.

Service of the within Assignments of Error by delivery of a copy to the undersigned is hereby acknowledged this 16th day of February, 1914.

CLAY ALLEN,

.. U. S. District Attorney.

Indorsed: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 16, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western District  
of Washington, Northern Division

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168. Bill of Exceptions.

### EXCEPTION No. I.

BE IT REMEMBERED, That upon the 20th day of May, A. D. 1912, an indictment was returned in the above entitled Court, charging the defendants, W. A. Ridgway and R. E. Glass, jointly, with having violated Section No. 3894 of the Revised Statutes, and Section No. 213 of the Penal Code of 1910, (Act March 4, 1909).

That thereafter, said defendants, jointly, interposed a demurrer to the said indictment.

Thereafter, said demurrer was, by the Court, overruled, to which ruling and decision of the Court, said defendants, and each of them, by their respective Attorneys, then and there excepted; and their exceptions were allowed.

### EXCEPTION No. II.

BE IT FURTHER REMEMBERED, That this cause came on duly and regularly for trial upon the 19th day of December, A. D. 1913, during the November, 1913 term, before the Honorable Jeremiah Neterer, District Judge, for the Western District of Washington, Northern Division; the United States being represented by Clay Allen, United States District Attorney, and Winter S. Martin, Assistant United States District Attorney for said Western District of Washington, Northern Division; and the defendants, W. A. Ridgway and R. E. Glass, appearing in person and by J. A. Kerr and Frank E. Hammond, their Attorneys; and the said defendants, W. A. Ridgway and R. E. Glass, having prior thereto been duly arraigned, to-wit: on the 19th day of June, 1913, and having pleaded not guilty to said indictment; a jury of twelve good and lawful men, being duly called, empannelled and sworn, the said cause thereupon proceeded to trial.

Witnesses on behalf of the Government of the United States were produced and sworn, who testified that the



defendants, Ridgway and Glass, in the latter part of 1908, on behalf of themselves and other persons, caused to be incorporated, the Jovita Land Company; That the Jovita Land Company acquired a tract of land between the City of Seattle and Tacoma, Washington, containing about five hundred (500) acres; This property or addition was designated as "Jovita", and was, by the Jovita Land Company, platted into lots and blocks, there being 2713 lots and tracts ranging in size from 40x120 feet to ..... acres; That after purchasing the property, the Jovita Land Company, proceeded to improve the property by clearing the land, building houses, grading streets, building side-walks, and otherwise making the property attractive; That the lots and tracts as finally delivered to the purchasers were of unequal size and value; That after platting the land, the Jovita Land Company, of which the defendant, W. A. Ridgway, was President, and the defendant, R. E. Glass, was Secretary and Treasurer, proceeded to sell the land upon contract, each interest in the tract of land being sold for the uniform price of One Hundred and Thirty Dollars (\$130.00) each.

In selling the land an undivided interest was sold to each purchaser, and at the time of the sale, the particular lot or lots which the purchasers agreed to buy, were not known or designated, and it was agreed in the contract, which was introduced in evidence as the Government's Exhibit No. Twenty-three (23), that after all the land had been sold, the purchasers or their representatives should meet upon the property and at that time, the Jovita Land Company would deliver to the purchasers, or their representatives, deeds to all the property so sold by the Jovita Land Company and purchased by the lot buyers, at which time the lot buyers could divide the property among themselves.

For the most part the letters and circulars set forth in the indictment and other literature, were sent out through the mail at times subsequent to the initial contract payments.

That prior to the 4th day of July, 1910, the Jovita Land Company caused notice to be given to the alleged lot buyers of the selection and appointment of certain representatives who would act for the contract holders and who were requested to meet on said date and be present on the land of the company; that on the date last men-



tioned a meeting was had at which were present these representatives, together with many other contract holders of the company, several hundred in number. Between 8:00 or 9:00 o'clock in the morning, the defendant, W. A. Ridgway, announced to the purchasers there assembled, that the Jovita Land Company was ready to turn over the deeds to the Trustees whom might be chosen by the people there assembled. By viva voce vote, five Trustees were chosen from among the persons present. These Trustees were then called forward, and the defendant, W. A. Ridgway, delivered to these Trustees, deeds to each and every lot or tract of the property sold, and took their receipt for the same. These deeds covering substantially all of the 2713 lots to be distributed had, prior to the drawing, been prepared and signed and acknowledged by the defendant, W. A. Ridgway. These deeds were executed in blank form as to the name of the grantee in each case. On the day of the drawing many of these deeds so prepared were by the employes of the company at the time filled in and actually distributed to the grantees selected by lot at the drawing and thereafter from time to time the remaining number of deeds were sent through the mails and distributed from the offices of the Company to the various and numerous alleged purchasers in various parts of the district and surrounding country. After these deeds were delivered to the Trustees, the defendant, Ridgway, withdrew from any further participation in the subsequent proceedings and went to Tacoma, Washington, but subsequently during the day, returned to the property. The defendant, Glass, was present at his home, but not personally present at the drawing.

That the defendant, R. E. Glass, was almost continually during the existence of the Jovita Land Company from its inception down to the day of the drawing and for some time thereafter present in both the offices of the company and on the land of the company at Jovita. The location of the land at Jovita is at a distance of approximately twenty-five miles from the City of Seattle, and approximately twelve miles from the City of Tacoma, and situated on an interurban line of railway running between Seattle and Tacoma, affording rapid and convenient means of transportation. The Jovita Land Company secured and used during its existence ample and complete office accommodations in the City of Seattle, and in this office a room was set apart for R. E. Glass for his occupation and use as

it might be required by him. The defendant, R. E. Glass, together with the defendant, Ridgway, were by all the employes of the company recognized as the directing officers. The employes Bacharach and Lyons, together with all the other employes of the company, took their orders from either the defendant Glass, or the defendant Ridgway. The defendant Ridgway was seldom in the City of Seattle prior to the drawing, while the defendant Glass was continually and constantly in the City of Seattle, or on the property during the life of the Company.

Immediately after the defendant, Ridgway, had delivered the deeds to the five Trustees selected by the purchasers, the said five Trustees, so selected, proceeded to divide the property among the purchasers, by drawing lots therefor, in the following manner:

The name of each purchaser had prior to the day of the drawing been written upon separate cards and placed in a box, which revolved upon an axis; upon other cards had been written the description of each lot or tract of ground contained in the five hundred (500) acres, known as "Jovita," and placed in another similar box; that is to say: If there were 2713 lots sold, there were 2713 names put in one box and in another box there were placed 2713 cards, on each of which was written the description of a lot. These five Trustees then drew one name from one box and at the same time drew a card containing the description of a lot from the other box, and the purchaser whose name was drawn from one box, was given a deed to the property described on the card drawn from the other box at the time his name was drawn.

The evidence connecting the defendants Glass & Ridgway with the transmission through the mail of the literature offered in evidence as well as the specific letters and literature mentioned in the indictment was circumstantial and tending to support a knowledge on their part of the general character of the literature and letters. No direct evidence was offered that Glass and Ridgway personally deposited the letters or literature mentioned in the indictment in the mail or requested that these particular letters should be sent through the mail. The employees in the office testified that the defendants did not request them to send through the mail the particular letters and literature mentioned in the indictment. There were some ten employees maintained in the offices, and these employees



had charge of the mailing of all matters sent from the office. The letters and circulars set forth in the indictment and introduced in evidence were matters which were sent out in the ordinary routine of the office. The defendant, Ridgway, was in the City of Seattle and Tacoma, but a very few times, he residing in Spokane, several hundred miles away from the office. The defendant, Glass, made his home upon the property, and superintended the improvements that were being made upon the property, and when he came to Seattle, he would come in on the Interurban, go to the office, sign the checks or attend to what might be absolutely necessary, and leave upon the next Interurban for the property; the Interurban train leaving every hour.

The witness Salzer testified that within the week prior to the drawing the defendant Glass, handed to the witness a diagram of a platform and boxes, and requested him to construct upon the land of the defendant Jovita Land Company a platform which was afterwards used at the time of the drawing; the writing upon the diagram furnished was in the hand writing of Lyons, an employee. The witness Salzer testified that a few days prior to the drawing the defendant Glass asked witness to construct two revolving boxes of unusual design, the construction of which boxes was, at the instance of the defendant Glass, concealed from all the other employes. The boxes constructed by the witness Salzer were set upon the platform constructed by him and were actually used as boxes from which were drawn the names of the owners and the numbers of the lots on the day of the drawing. All of the persons who handled the deeds and tickets, after the tickets had been drawn from the boxes by the Trustees selected at the drawing, and who performed the physical work of filling them out and delivering them to the grantees on the date of the drawing, were employes of the company who were directed in the office of the company to be present on the Jovita land on the day of the drawing.

The defendant Ridgway called a meeting to order at the time of the drawing and was personally present during a good portion of the day. All of the witnesses for both sides agreed that at the time the meeting was called to order tickets upon which had been previously inscribed twenty-seven hundred and thirteen names, and other tickets upon which had been inscribed twenty-seven hundred and



thirteen different pieces of property were present and ready for use upon the morning of the drawing. No witness for either the government or the defense gave any explanation of the source from which the tickets had come.

The witness, McCash, called for the government, testified that prior to the drawing he had a conversation with the defendant Glass and the defendant Glass had stated to the witness McCash that the customary way to dispose of lots under the circumstances was by drawing.

The evidence submitted by the government of various witnesses, including the real estate expert called, established the cost of the entire property, together with the comparative cost of the tracts as distributed, showing a variation from five to ten dollars an acre in the case of a great majority of the lots to one of an approximate value of five to six thousand dollars, each tract of which of this wide disparity of value was distributed to the twenty-seven hundred and thirteen buyers upon a consideration which was in all cases the same, that is, one hundred and thirty dollars each.

A Mr. Bacharach was book-keeper and in charge of the Seattle office, and a Mr. Lyons was in charge of the advertising, and a Miss Potts was the head stenographer and in charge of all routine correspondence and in charge of the office in the absence of Mr. Bacharach.

C. A. Stokes was called as a witness on behalf of the Government, who being sworn, testified, that he had owned the property platted by the Jovita Land Company, and known as "Jovita," and had negotiated with F. E. Hammond for the sale of the property, and had in the latter part of 1908, made a contract to sell the land to R. E. Glass, and placed in escrow, deeds to the property, and after receiving full payment for the land, deeds conveying the land direct to the Jovita Land Company were delivered to the Jovita Land Company.

The witness was then asked to testify as to the amount of money he was paid for the land. To which interrogatories, the defendants, and each of them duly objected, and objected to the introduction of any evidence as to the purchase price of the land, paid by the Jovita Land Company, for the reason that it was irrelevant and incompetent and was offered for the purpose of prejudicing the

minds of the Jury. The objections of the defendants were by the Court overruled. To which ruling the defendants, and each of them, duly excepted, and their exceptions were allowed. The witness then testified, that he had received One Hundred and twenty thousand Dollars (\$120,000.00) for the land and improvements.

During the progress of the trial, the Government called Adolph Behrans, who being sworn, testified that he had been in the real estate business in the City of Seattle for twenty-one (21) years, and at the request of Mr. Allen, United States District Attorney, he had, within the past ten days, examined the property sold by the Jovita Land Company. He was then interrogated as to the value of the land and the character of the soil at the time he made his investigation, for Mr. Allen, to which interrogatories, the defendants, and each of them, then and there objected, and objected to the introduction of any evidence relative to the value of the land at the time of the said examination of the same by the witness, for the reason that it was incompetent, irrelevant and offered for the purpose of prejudicing the Jury; which objections the Court overruled, and the said defendants, and each of them thereupon excepted to said ruling, and their exceptions were allowed. The said witness testified that said land was of the value of not to exceed Sixty-five (\$65.00) Dollars, per acre, and the forty (40) foot lots were not worth to exceed Five (\$5.00) Dollars or Ten (\$10.00) Dollars each, and the cottages upon the property could be built from Six Hundred (\$600.00) Dollars to One Thousand (\$1000.00) Dollars each. That the values in July, 1910, were but slightly less.

The Government then called as a witness upon its behalf, David Young, who being sworn, testified that he had been in the real estate business in the City of Seattle for about nine (9) years; that he had examined the property in company with the witness, Adolph Behrans, at the request of the United States District Attorney. He was then asked to give the value of the property and its general conditions, to which interrogatories, the defendants, and each of them, objected, and objected to the introduction of any evidence as to the value of the land, for the reason that the evidence was incompetent and irrelevant and offered for the purpose of prejudicing the jury; which objections were by the Court overruled, and the defendants, and each of them thereupon excepted, and their excep-



tions were allowed. The witness then testified that in his opinion the land was worth not to exceed the sum of Seventy-five (\$75.00) Dollars per acre, and that the forty (40) foot lots were worth not to exceed Four (\$4.00) Dollars or Five (\$5.00) Dollars each.

### EXCEPTION NO. III.

Carrie M. Buck, a witness called on behalf of the Government, testified that she had received through the post office establishment of the United States, the literature set forth in Count Two (2) of the indictment, and the same was introduced in evidence as Government's Exhibit Fifty-five (55).

George Spicher and H. Giesy were called as witnesses on behalf of the Government, and testified to having received through the post office establishment of the United States, the letter referred to in Count Seven (7) of the indictment, and the same was admitted in evidence as the Government's Exhibit Twenty-five (25).

Subsequent to the testimony of the said witnesses, Buck, Spicher and Giesy, the Government called as a witness, Ira C. Luman, and the Government offered to prove by the said witness, Ira C. Luman, that he had received through the United States mails, the literature referred to in Count Three (3) of the indictment, and the literature referred to in Count Four (4) of the indictment, whereupon the defendants, and each of them objected to the introduction of any evidence as to Counts Three (3) and Four (4) of the indictment, for the reason that the said Count Two (2) and Count Seven (7) of the indictment, concerning which evidence had already been introduced by the Government, were based upon the law as in force prior to January 1910, making the offense charged against the defendants, a misdemeanor; whereas, the offense charged in Counts Three (3) and Four (4) of the indictment, is a felony, and is based upon the law as in force subsequent to January, 1910, and the Government having proceeded to prosecute the defendants upon Counts Two (2) and Seven (7) of the indictment, for a misdemeanor, could not, also, prosecute the defendants in the same indictment, for a felony. The Court overruled the objections of the defendants, and the defendants, and each of them thereupon excepted to the ruling of the Court, and their exceptions



were allowed. The witness then testified that he had received through the United States mails, the literature in Counts Three (3) and Four (4) of the indictment, and the same was introduced in evidence as the Government's Exhibit Sixty-three (63) and Sixty (60), respectively.

During the progress of the trial, said defendants filed with the Court, the following proposed instructions, among others, with the request that the same be given on behalf of the said defendants, as a part of the Court's charge to the Jury:

No. 4

"I instruct you, gentlemen of the jury, that the scheme concerning which the law forbids any letters or circulars to be deposited in the mails is such a scheme as is similar to a lottery offering prizes to those who participate in said scheme, the ultimate ownership of which prizes must depend upon lot or chance."

No. 5

"I instruct you that any number of persons may buy jointly a tract of land in any condition and subsequently divide it among themselves by drawing lots and the person selling them the land, even though he knew they intended to divide it by a drawing or otherwise, would not commit a crime if he deposited or caused to be deposited any mail matter relative thereto in the post office of the United States similar to that set forth in the indictment in this case."

No. 6

"I instruct you that in determining whether there was a lottery or other similar scheme of chance devised or carried out; that where two or more persons who are the owners of undivided lots of land determine or arrange to apportion their respective interests therein among themselves, and the plan of so apportioning or dividing the same is by casting lots and thereby ascertain and apportion to each his interest in severalty by chance or lot, this is not a lottery or similar scheme of chance as contemplated by the law, for, the law contemplates that, in a lottery or other similar scheme, the title to the prize or property has not yet passed to the purchaser or person entitled to the chance and that it is by lottery or similar scheme of chance that the purchasers obtain the property or so called prizes, and the law contemplates that the title, at the time of the

lottery or other similar scheme of chance was had or held, was in some one other than the purchaser or person taking the chance, and that the right which was held by the parties expecting or seeking prizes was merely a right to participate in the lottery or drawing with the understanding or agreeemnt, express or implied, that, thereafter, there would be conveyed or transferred to him the prize or property which might, by reason of such lottery or similar scheme, fall to him by reason of such drawing or scheme. That in all lotteries, or similar schemes of chance, as defined by law, there must be some party or parties holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance."

No. 7

"You are instructed that at the time the Jovita Land Company delivered deeds to the lot buyers all title to the land, houses and other improvements passed from the Jovita Land Company to the lot buyers and the lot buyers were then the absolute owners and entitled to the possession and control of the property; that thereafter all the lot buyers owned an undivided interest in each and every house or part or parcel of land, which included the alleged prizes alleged to have been offered; that upon the delivery of said deeds all control over the subsequent disposition of said property passed from said Land Company, or these defendants, and any purchaser if he wished could have gone into the State Court and had the land partitioned equitably among them or they had the right to divide it among themselves by lot.

No. 8

"You are further instructed that at the time of the execution of each contract of sale of an undivided interest, the purchaser became the owner of an undivided interest in the land, houses and other improvements owned by the Jovita Land Company and as long as the purchaser made his payments the Land Company could not divest him of his title and the purchasers title was as complete in the alleged prizes as in the unimproved land; in other words you are instructed that the purchasers from the time of their purchase at all times owned the alleged prizes as well as the unimproved land and small tracts and these



purchasers after obtaining title could lawfully allot their land among themselves as they might agree without any control or interference upon the part of the defendants.”

No. 9

“You are further instructed that if the said purchasers had refused to allot their land by lot, chance or drawing, the Jovita Land Company could not have compelled them to hold a drawing, nor could the Jovita Land Company have held any drawing or apportionment that would have been binding upon the lot buyers.”

No. 10

“This brings you to the consideration of the second question, viz: Did the defendants, Ridgway and Glass, devise a scheme in connection with the sale of the Land by which a drawing was to be conducted under their supervision, or that of their authorized agents and employees, as charged by the Government; or did the defendants as claimed by them, simply sell to various and sundry persons undivided interests in the land platted by Jovita Land Company, leaving it to the purchasers themselves to partition said lots among themselves as they saw fit? Contracts of sale for said land have been exhibited to you which it is claimed the Land Company executed, which contracts purported by their terms to sell but an undivided interest in the land platted, and which provided further that the several purchasers should meet and partition the land as they saw fit. These contracts further provide that no selling agent has any power to alter or change their terms. The defendants further deny that they or either of them at any time authorized any agents to vary, change or modify the terms of such contracts, and deny any knowledge that any such agent had ever attempted so to do. The defendants further deny that they or either of them had anything whatever to do with any drawing or the division of said lots, and deny that the plan therefor was their plan, or that they supervised it, or that the same was supervised with their knowledge or consent by any agent or employee of their or of said Land Company.

You are accordingly instructed that if you find that defendants did in good faith sell undivided interests in the property platted by said Land Company, and that the



plan of allotment was not their plan, but a plan adopted and carried into effect by the purchasers for the purpose of partitioning the property among themselves, your verdict must be for the defendants.”

No. 10½

“If, however, on the other hand, you should find that there was a lottery scheme offering prizes and that it was the scheme of the defendants, or either of them, and that they or either of them sold the property to the several purchasers in contemplation that the same would be allotted by chance and that thereafter a drawing was held prior to the transfer of title from the Land Company to the purchasers and that the defendants or either of them arranged and supervised such drawing or caused the same to be done, and that in connection with the sale of said property the defendants, or either of them, within three years prior to May 20, 1912, deposited or caused to be deposited in the United States mails letters and circulars as alleged by the Government for the purpose of furthering and aiding such scheme, then I instruct you the defendants would be guilty of the crime charged, and in this connection, I instruct you that the delivery of deeds to the authorized representatives of the purchasers would be the same as a delivery of the deeds to the actual purchasers of the lots.”

No. 11

“I instruct you that unless you can find that the defendants personally deposited the mail matter or directed some one else to do so you must acquit the defendants.”

No. 14

“I instruct you that the law presumes that the Jovita Land Company and the purchasers intended to carry out their contract in a lawful manner and the Government must overcome this presumption by evidence that convinces you beyond a reasonable doubt and it is presumed by Law that all parties connected with the sale or purchase of the Land believed and contemplated that after the delivery of the deeds the land would be partitioned among them in a legitimate manner.”

## No. 18

"I instruct you that the mere fact that these defendants were officers of the corporation known as the Jovita Land Company is not of itself sufficient to prove that they knew that there was in existence a scheme similar to lottery, being conducted by the Jovita Land Company, nor is it sufficient to prove that they deposited or caused to be deposited the letters or circulars set forth in the indictment."

## No. 19

"The mere reception of the matter, alleged to have been deposited in the mail, by the person to whom it was addressed, would not of itself establish the fact that defendants deposited or caused to be deposited, such matter in the mails."

## No. 22

"I instruct you that the defendants in this case are entitled to the individual opinion of each member of the jury as to their guilt or innocence and if any juror entertains a reasonable doubt as to their guilt of any one of the necessary elements of the crime charged he should not vote for a verdict of guilty merely because any other or other jurors, even a majority of them, believed the defendants guilty."

## No. 24

"You are instructed that there is nothing contained in the letters or circulars set out in the indictment that is even suggestive of a scheme similar to a lottery offering prizes dependent upon lot or chance, nor on their face are they concerning such a scheme.

Standing along, by themselves, the defendants would commit no crime by depositing in the mails such letters or circulars, therefore, you must look to other evidence to determine if the said letters and circulars are concerning a scheme to a lottery, as charged in the indictment."

## No. 28

"I instruct you that if from the evidence or statements of Counsel you have gained the impression that the Jovita Land Company or either of these defendants, lost money or gained money by reason of the alleged transactions, you must entirely disregard it for any purpose for the



reason that whether they gained or lost by the transaction has nothing to do with this case; neither does it make any difference whether or not the property sold by the Jovita Land Company was worth the amount it was sold for. There is no charge of fraud in the indictment against these defendants and there is no evidence upon which you would be justified in presuming any fraud."

Thereafter, at the close of the testimony, and after the arguments to the Jury, the Court charged the Jury as follows:

### INSTRUCTIONS OF THE COURT.

"Gentlemen of the Jury:

All parties connected with the prosecution of a criminal case have special duties and functions resting upon them. The United States Attorney and his assistant, representing the government on the one side, and the attorneys for the defendant, representing the several defendants, each have their separate functions. Their duties are to present to the Court and the Jury all material and relevant facts which bear upon the guilt or innocence of the defendant. In the discharge of these duties these parties necessarily appear as partisans, and endeavor to present all of the facts in the most favorable light to sustain their contentions with relation to the issues before you. Your duty and that of the presiding Judge is different. It is the duty of the Judge to impartially instruct you upon every matter that is presented and endeavor to secure for the government and the defendants a fair and impartial presentation of every contention which is claimed bears upon the issue, and to exclude, so far as possible, matters which are foreign to the issues, and which will not aid the jury in applying the facts of the law or to conclude with relation to the guilt or innocence of the defendant. Your duty, gentlemen of the jury, is a special function which is separate and apart from any of the others, and makes you the sole and exclusive judges of the facts. All of these facts, matters of fact, are solely left to you. You are the sole judges of the facts, and must determine what they are. You take the law, as applicable to the facts, from me as presiding Judge. You have been accepted as trial jurors by the attorneys for the United States and the defendants because they have confidence in your integrity, in your



fairness, and in the belief that you will approach the issue in this case free from bias, and with open minds impressionable to receive the truth and define it from the evidence. You will not pass upon the facts in this case or arrive at a conclusion because of any desire to favor either the government or the defendant, or because of any feeling of fear either for or against either party, but with openness of mind and acuteness of conscience approach the subject with that feeling of responsibility which the subject demands, keeping in the mind the fact that the government can only be maintained and be of service by the enforcement of criminal laws, not out of a spirit of revenge, but rather a desire to impress upon all people that the laws of the country must be lived up to, and if violated the parties will be punished. You will therefore accord to the government in this case and to the defendants a fair and impartial consideration which the subject demands, and fully discharge your obligations as jurors.

The issue in this case is not an action prosecuted by the government's attorney either in his own behalf or on behalf of anybody else, for any act which has been committed or alleged to have been committed by anybody. While evidence has been admitted here in relation to matters which are not directly in issue; they have simply been admitted before you as circumstances to be considered will all of the circumstances and facts surrounding the testimony in the case, to enable you to arrive at a more intelligent conclusion.

The fact that an indictment has been presented in this case by the Grand Jury is no evidence that any crime has been committed. The grand jury simply make this presentment upon the evidence which has been presented by the government, and that is simply a paper charge against the defendants which requires that every material allegation in the indictment be established by the evidence, which is admitted beyond a reasonable doubt. The defendants have pleaded not guilty to the indictment, and that places in issue every material fact alleged in the indictment. You are further instructed that the defendants are presumed to be innocent of the offence charged in this case until they are proved guilty beyond a reasonable doubt; and that presumption continues with them throughout the entire trial; and until you are convinced by the evidence which is offered and admitted beyond every reasonable

doubt. This presumption is not a mere matter of form, but it is a right which is accorded under the law, and must be given effect until the testimony which is offered and admitted overcomes this presumption and convinces you beyond a reasonable doubt. The indictment in this case contains ten counts, which will be sent with you to the Jury Room, but is not to be considered as evidence in the case. You are instructed however, that three counts in this indictment have been disposed of heretofore, to-wit: counts 1, 5, and 9, have been disposed of, and there is no evidence with relation to counts 6, 8 and 10; no testimony has been offered in this case concerning those counts. You are, therefore, not concerned with those counts, except as to count 1, which is the only count in the indictment which describes a scheme that is alleged to be similar to a lottery, and that part of Count 1 commencing on line 19 on page 3 of the indictment, and concluding with Count 1 is a part of each of the subsequent Counts in the indictment, and must be considered with each Count as it is descriptive of the scheme concerning which the defendants are alleged to have mailed matter which it is claimed is in violation of the law. Therefore the counts involved in the issues in this case are 2, 3, 4, and 7, and they must be considered by you in your consideration of each of these counts, that is, Count 1 is just a description of the scheme concerning which the defendants are alleged to have mailed matter which, it is claimed, is in violation of law. These counts are all similar in most respects, with the exception of mailing different matters. The descriptive part of the scheme is set out in Count 1, and will be considered by you in connection with each County; and that is the offering of prizes dependent in all or in part upon lot or chance. All of the counts in the indictment are based, so far as you are concerned in your deliberations in this case, upon Sec. 213 of the Penal Code of the United States, which, so far as is pertinent, reads as follows: "No letters, packets, postal card or circular concerning any lottery, gift or enterprise or similar scheme offering prizes dependent in all or in part upon lot or chance; and no lottery ticket or part thereof, paper, certificate or instrument purporting to be or representing a ticket, chance, share or interest in or dependent upon the event of a lottery, gift, enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance  
\* \* \* and no newspaper, circular, pamphlet or publica-



tion of any kind containing any advertisement of any lottery, gift enterprise or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes which shall be deposited in or carried by the mails of the United States or be delivered by any postmaster or letter carrier."

The law further provides that whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this law shall be punished. You are instructed that the gist of the offense comprehended by this law is the use of the mails to promote or give information relative to a lottery or other similar scheme of chance.

You are instructed that there is no Act of Congress in the United States which prohibits the operation or conduct of a lottery; only the use of the mails to carry out the plan or scheme is prohibited, or any of the instrumentality or interstate commerce; and the government of the United States maintains what it calls a postal system for the carriage of the mails. It has a right to say what matter shall be carried and what shall not be carried. It may prohibit the use of the mails even for the promotion of legitimate enterprises, and it follows, of course, that it may prohibit the use of the mails for the promotion or furtherance of any scheme or plan or enterprise or business thought by Congress to be inimical to the public interest, or for any reason demoralizing; and in the wisdom of Congress it has seen fit to prohibit the use of the mail for the purpose of mailing or carrying out a lottery scheme or plan. You will therefore see that the following questions are submitted for your consideration:

FIRST: At or about the times of the alleged posting of the letters or matter set out in the indictment, was there a scheme similar to a lottery, which offered prizes dependent in all or in part upon lot or chance? and

SECOND: Did these defendants plan such scheme as charged in the indictment? and

THIRD: Was such scheme actually carried out by a drawing for prizes held prior to issuing deeds, as alleged



in the indictment, by distributing prizes by lot or chance; and was such distribution made under the supervision or direction of the defendants Ridgway and Glass, or their agents or employees?

FOURTH: Did the defendants deposit or cause to be deposited in the post office establishment of the United States, the letters or circulars set forth in the indictment; knowing at such times that such letters or circulars were deposited for the promotion and concerning the alleged scheme as set forth in the indictment?

You are advised that a lottery is a species of gaming or gambling; and it may be described as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay for a valuable consideration for chance of obtaining a prize. The prize may be anything of value. It is not essential that it be paid in money or that it have a fixed market value. It is essential, however, that the distribution be by chance or lot; but the mode adopted is wholly immaterial, so long as chance is the controlling feature. To constitute a lottery it is not necessary that there be blanks in the drawing. Nor is it essential that some persons secure prizes of less value than the price paid for participating in the lottery. The scheme is none the less a lottery because it promises prizes to all of the participants, none of which are of a value less than is paid for the chance of participating, provided that the values are unequal, and there is always a chance of the participants to win something greater than the value which he paid for the chance of participating. It is obvious therefore if after considering all of the evidence before you you conclude that the plan, scheme, project or enterprise, whatever it may be called, relied upon by the government in support of its contention that was a lottery, was in fact, under the law, as defined to you in these instructions is not a lottery, your duty is at an end, because it would be unnecessary for you to proceed further and determine the second question in the issue, which is, did the defendants either mail or cause to be mailed the particular matter set forth or referred to in each of the different counts, 2, 3, 4 and 7, in the indictment? In other words, the first question is was there a lottery? And the second question is, did the defendants mail or cause to be mailed one of these papers referred to or concerning the lottery?

You are instructed that the mere selling that the mere

selling of undivided interest in property is legitimate, and involves none of the essential elements in a lottery or of a similar scheme of chance; and any one could properly use the mails for the promotion of such sales; that is to say, if one or more of you owned one or more farms, or one or more town lots, you would have a perfect right to sell all or part thereof to one or more persons; or at your option, you could sell any number of undivided interests therein to as many different persons. That would be entirely legitimate; and when such sales of undivided interest are made in good faith, without suggestions or inducements, at or before the time of sale, of a distribution by resort to lot or chance, it would be immaterial if thereafter the purchaser as the owners of the several undivided interests adopted a method of chance for the division of the property, or the distribution to the several purchasers. In such case there would be no lottery scheme for the element of chance did not operate or become an inducement to the purchaser of shares or interests. On the other hand, one owning a number of parcels of property cannot, under the pretense of making sales of undivided interests therein, base it upon the value or the supposed value thereof, making use of a scheme by which the inducement to purchase however much disguised or covered up are in reality the essential features of a lottery; that is to say, it is the substance and not the mere form of the plan or enterprise by which it is to be characterized as lawful or unlawful.

Now, applying these principles to the case under consideration, you are instructed that if the defendants, acting in the name of or through or on behalf of the Jovita Land Co. (I think that is the name charged and referred to in the indictment)

Mr. Kerr: That is right.

(THE COURT: continuing) and desiring to dispose of or sell a large number of parcels of land which they or the company owned devised a method of sale of undivided interest therein which involved no element of chance, and which did not contemplate that sooner or later there would be an award or distribution by resort to lot or chance, the mere fact that at a later date, and after the defendants had made a complete transfer of the property, if you find a transfer was made, and no longer had any interest therein, the purchasers then being the owners of the undivided interests con-



ceived of a method of lot or chance to distribute the several parcels, that fact would not operate to make the plan a lottery scheme, or render it illegitimate, or impose any blame for wrong on the defendants. On the other hand, however, if the plan was either directly or indirectly, expressly or otherwise to induce persons to make purchases with the understanding or upon the expectation that by purchasing contracts they would have a chance to procure a prize or property of considerable value by resort to lot, or if the natural and probable effect of the scheme by reason of its inherent characteristics was a drawing by lot or chance, then you would be warranted in finding that the enterprise was a lottery or similar scheme of chance from the beginning. In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their acts by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and handed to a trustee before the drawing, and that the defendants took no part in such drawing. The preliminary question for you to consider is whether the defendants did or did not set on foot a scheme or plan which they believed, or had reason to believe, would eventuate in such a drawing. Was the drawing the natural and reasonable outcome of the enterprise? Why was such a plan adopted by the defendants for the sale of their property? What was their motives? Did they or did they not expect that by reason of the nature of the property, the number of parcels, the number of contracts, the form and substance of the contracts, the printed literature, the improvements upon the property of various values, and all other circumstances pertaining to the carrying on of the project, purchasing the contracts or shares with the expectation of having a drawing, or distributing the property by lot or chance? Did the defendants intend that such expectation on the part of the public would be an inducement and would be the moving consideration in securing purchasers. The Government contends that that was the purpose and motive. The defense contends to the contrary. It is for you to say on which side the truth lies.

You are instructed that, under a proper interpretation, the contracts entered into between the Jovita Land Company and the purchasers does not provide for the drawing or distribution by resort to lot or chance, and in itself the instrument implies nothing illegal or wrong on the part of



the defendants, and that point it will be your duty to consider as a circumstance in their favor, but is not conclusive; but a circumstance to be considered with all other facts and circumstances as detailed by the testimony; and determine whether the contracts did, in fact, state the real intentions of the parties.

You are further instructed in this connection that every sane person is presumed to intend the natural and logical consequences of his voluntary act; that is, if the defendants or either of them in the conduct of this service must have contemplated that the United States mail would have to be used in the correspondence with the contracting parties for the purchase of an interest in this land, and that their, or either of their employees under general directions sent out this mail matter as that is described in the indictment, then you would be justified in finding, if the evidence is sufficient to convince you beyond a reasonable doubt, that they did cause those things to be mailed, although they did not direct any one particular piece of mail to be sent to a particular addressee; and if you find that they were trustees in the Jovita Land Company, and executive and managing heads, and exercised an active supervision and control over the corporation's affairs, they would be responsible for any general directions given in relation to the mailing of literature, whether they personally gave the directions to mail or not.

You will, of course, understand that every man who buys property for speculation expects to make a profit. You are not to be misled by these instructions into the belief that just because the purchasers expected it might be of greater value than one hundred and thirty dollars that it would necessarily be a lottery. You should consider well all the facts and circumstances in evidence, and in the light of the entire record say what the real motive and intent and purposes of these defendants were, and let your verdict be accordingly. Now, as to the other phase of this case, the instructions may be very simple. For if you should find that there was a lottery scheme, and that these defendants were engaged in promoting it, the other questions are simply questions of fact having little to do with motive or intent; and that is, did the defendants or either of them mail or authorize to be mailed the matter set out in the indictment? If you are satisfied by the evidence beyond a reasonable doubt that the matters described in the indictment or any

part thereof were deposited in the United States mail for transmission to the addressee or addresses at or about the time named in the indictment, and within three years preceding the filing of the indictment; that is, three years prior to May 20, 1912, and that these acts of so placing such documents in the mails for transmission was done by the defendants or either of them, or by one acting under the direction or control of these defendants or either of them, in the usual course of employment necessarily involving the mailing of such documents, and that such course of employment so involved the mailing of such documents, either directed or put into operation by the defendant or either of them, so controlling or directing the persons so mailing the letters or matter, and in such course of business cause such letters or matters to be placed in the mail, as that term is used in the indictment.

Before you can consider any statement in any process of showing the purpose of either defendant, you must find from the evidence that such defendant or defendants authorized or caused its use. If the defendants devised this scheme for the distribution of the property for the purpose, and with the intention and understanding that people would be attracted by it and would be induced to purchase interests or shares for the reasons among other things that in the drawing by resort to lot at which every contractor or shareholder would have the chance to draw a more valuable piece of property, as well as a smaller piece of property, if you find beyond a reasonable doubt that they did devise and further such plan for such a purpose, and with such intent and understanding, and that such scheme was that described in the indictment, then you may find that they were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though you find they contemplated withdrawing and did actually withdraw from participation in the enterprise before the drawing was held, and that they took no part in the drawing. If on the other hand, you find that the defendants did not purpose, intend or believe the plan devised by them would be regarded by the public and by contemplating purchasers as offering an opportunity to the purchaser to procure by lot or chance property of considerable value for a comparatively small sum paid for the share or interest; in other words, if you find that they did not know or understand that the scheme would be attractive for the reason, among others, that sooner or later



there was to be a drawing by resort to chance at which valuable prizes were to be drawn, then you should find that the scheme was not in the nature of a lottery, even though after the defendants transferred the property the shareholders distributed the several parcels thereof by resort to lot or chance. This involves, as you understand, to a large extent, the element of good faith on the part of the defendants. Were they in good faith simply selling undivided interest in properties of which they were possessed, with no other inducement to purchasers than the value, or supposed value of the property or the merits thereof, or were they in bad faith, and under cover of legal form, knowingly and in reality appealing to the weakness of the passion prevalent in human nature, the gambling spirit, by which many people are easily induced to invest or to risk comparatively small sums upon the chance of winning a prize of much greater value. If you find that they were acting in good faith in the manner which I have explained, then you should find that they were not knowingly engaged in a lottery scheme, and in mailing or causing to be mailed matter which could not lawfully and legally be done. On the other hand, if you find that they were acting in bad faith in the manner which I have explained, then you should find that the scheme involved the essential features of a lottery or scheme of offering prizes dependent in all or in part upon lot or chance.

As already suggested, it is a question of what the essential nature of the whole enterprise was. It is for you to say what meaning these defendants intended to convey by the representations in any pamphlets or circulars that they may have used in promoting the sale of property, what impression did they expect to make upon the public thereby? How did they intend that a purchaser would understand such statements? Was it intended thereby impliedly to represent that such property should be purchased by paying one hundred and thirty dollars for a chance at a drawing at which the property was to be awarded by lot or chance? Or was it the intention to convey the meaning that it could be procured in some other way by the payment of one hundred and thirty dollars? Or what was the intention intended to be made?

You are instructed that the law does not, as a rule, permit proof to be given of what one man has said or done in order to affect the matter. One can only be affected by what he has said or done himself. What one has said or done cannot be evidence against another unless he was acting



with the other's authority, or in accordance with a plan which was adopted by both parties which was common to both or all, and in which they were interested. When a thing which the parties have been doing separately and apart from each other, and in the interest of a common plan or purpose, or if you find that there was a common plan or purpose, can only be explained on the theory that they were acting in pursuance of such plan which they had previously adopted, and which was well understood, it may be found that they had previously adopted the plan disclosed by the evidence and which led to the result as described. One question, therefore, in this case is, whether the acts of the defendants when considered in their relation to one another do fairly and convincingly indicate that they were acting in pursuance of a common plan and purpose, and that the defendants, Glass and Ridgway were acting with relation to such plan, and to the advancement of a common plan and purpose in the advertisement and disposal of the property referred to in the indictment, and concerning which testimony has been received; and if these acts so fit together and match each other that the only reasonable explanation of them is that they were acting for and on behalf of each other and according to a well understood and well defined plan, if you are convinced by the evidence that such is the fact, then you may consider the act or the statement of one in furtherance of such a common plan as you may find, if any, to have been adopted as against the other defendant, whether the other defendant was present at the time of the statement or at the time of the action or not, at the time the statement was made, or at the time the act was done, or whether they were not.

You are instructed, gentlemen of the jury, that if you should find from the evidence in this case or have a reasonable doubt upon that phase of the issue in this case as to whether the defendant, Ridgway, knew anything about the matter of the conducting of the business of the Jovita Land Company or of the plan, method or scheme set forth in the literature that you may find from the evidence was sent out from the office of the Jovita Land Company, and that he in good faith sought advice of one or more attorneys at law as to what he could lawfully do in connection with the platting and sale of the property of the Jovita Land Company, and fully and honestly laid all of the facts before his counsel and in good faith and honestly followed such advice

as you may find that he was given, replying upon and believing it to be correct, and that in his connection with this land company he only intended that the acts performed by him in connection with the company should be lawful, he cannot, under such circumstances, be convicted of knowingly doing a thing which was prohibited by law, even if such advice that was given him was incorrect. But, on the other hand, you are instructed that no man can wilfully violate the law and excuse himself from the consequences thereof by pleading that he sought the advice of counsel. As to whether the defendant, Ridgway, knew of the plan, method or scheme, if it may be so designated, adopted and pursued by the Jovita Land Company or acted upon the advice of counsel, will be considered by you with all of the facts and circumstances as disclosed by the evidence. You will take into consideration all of the testimony which was before you as to what he said to his attorney, and how he advised him, and the advice that was given him, and you will consider likewise all of the testimony in this case as to whether he knew at the time the purpose and relation to the literature which has been offered in testimony in this case, or whether, after he received the advice he knowingly permitted or authorized literature to be mailed as charged in the indictment.

You are further instructed, gentlemen of the jury, that in this case considerable evidence was admitted to go before you in the mailing of circulars and matter other than that charged in the indictment. You are instructed that that was permitted to go before you not for the purpose of establishing an offense other than that charged in the indictment. You cannot convict the defendants in this case if you believe any matter other than that set out in the indictment was mailed, and have a reasonable doubt as to whether the matters charged or come of the matters charged in the indictment was mailed as set forth in the indictment. Some instructions were given you in the course of the trial with relation to some of this matter. As I think, you are further instructed that it was permitted to go to you not for the purpose of establishing an offense, other than that charged in the indictment. You cannot convict the defendants in this case if you believe any matter other than that set out in the indictment was mailed, and have a reasonable doubt as to whether the matter charged, or some of the matters charged in the indictment was mailed as set forth in the indictment.



Nor can you convict the defendants or either of them if you believe that any other mail matter was mailed than that which has been admitted in evidence here, if you have a reasonable doubt whether any of the matter which is charged in the indictment was mailed. That evidence was permitted to go before you simply for the purpose of giving you the surrounding circumstances with which this company was transacting their business, with the view of enabling you to arrive at the motive, purpose and intent with which the defendants operated in the disposition and distribution of the property which is referred to in the indictment, and concerning which evidence was admitted, and you cannot and must not consider that testimony for any other purpose.

You are instructed, gentlemen of the jury, that some evidence has been permitted to go before you of the value of the tract of land composing the plat, of the Jovita Land Company during the latter part of the year 1909, and up to the First day of July, 1910. So this has not been permitted to go before you in determining any questions of fraud, or as to whether any person was defrauded by the defendants. There is no evidence in this case to be considered in relation to any fraudulent acts of any kind; and you are not concerned with any inquiry in relation to anything of that kind, and must dispel any such thought from your minds if any may lurk there. That evidence was only permitted to go before you for the purpose of surrounding you with the conditions with relation to this land surrounding the offense covered by this indictment and as an element to be taken into consideration by you if it will aid you in a conclusion in determining the purpose, motive or intent of the defendants in outlining the plan, system or scheme by which this land was to be placed on the market and subsequently distributed either by the purchasers or to the purchasers, and subsequently the scheme or plan or such a scheme or plan as comes within the section of the act of Congress which has been read to you, to promote which matter is prohibited to be carried in the United States mail.

You are instructed that while the burden is upon the government to establish every material allegation of the indictment beyond every reasonable doubt that this need not be done by direct and positive testimony, but may be established by circumstantial evidence. Circumstantial evidence is legal and competent in criminal cases when it is of such a character as to exclude every reasonable hypothesis other



than that the defendants are guilty, and when it is of such a character it is entitled to the same weight as direct evidence. What is meant by circumstantial evidence is proof of such facts and circumstances surrounding the defendants and the transactions charged in the indictment concerning which testimony was received and the commission of the crime charged tends to show the guilt or innocence of a party charged; and if these facts and circumstances are sufficient to satisfy you beyond a reasonable doubt then such evidence is sufficient to authorize a conviction. No rule can be given as to the quantity or circumstantial evidence which in any case shall be deemed sufficient. All of the circumstances concerning which testimony was given should be taken into consideration, and from all of these you should determine the guilt or innocence of the parties charged. All of the circumstances established by the evidence in this case must be consistent with each other, consistent with the hypothesis that the accused are guilty, and at the same time inconsistent with the hypothesis that they are innocent, and with every other reasonable hypothesis except that of guilt.

Some evidence relating to the honesty and integrity of the defendant, Ridgway, in the community in which he resides has been introduced in this case. The law permits that class of evidence to be received. It is an exception to the rule which generally excludes hearsay testimony. The theory of the law is that if a man has so lived in his community as to have acquired a reputation for honesty and integrity the presumption is that he is entitled to it. That is, the presumption is that he is honest, or else he would not have such a reputation, and that is allowed to be introduced. General reputation in the community where a person resides is what people say of him, or what people think of him in that community in relation to his probity, honesty and integrity in dealing with people. The value of such evidence is necessarily dependent upon the opportunity of the witnesses for knowing about the opinion of people generally in that community with relation to such honesty, and is not determined by what one individual may say from his own dealings with a party; and when you consider any evidence relating to a man who has borne a good reputation for honesty and integrity you are to remember the fact that he has borne that reputation and consider that in determining whether the charge against him is true. Good character is a fact like all other facts proven in a case to be weighed

and estimated by the jury, and is especially proper to be shown in a case depending upon circumstantial evidence. In a doubtful case it may turn the scale in favor of the accused. It must not be allowed, however, to refute the other testimony in the case, and cannot justify an acquittal where the evidence of guilt is clear and convincing. In considering the testimony in behalf of the reputation of the defendant, Ridgway, for honesty and integrity you will take into consideration the scope of the knowledge of the several witnesses who have testified in that regard and give it such weight and credence as you deem the testimony is entitled to, taking into account the opportunity of the witnesses for knowing about such reputation, and if such testimony is sufficient to raise a reasonable doubt in your minds as to whether the defendant, Ridgway, did commit the offense charged in the indictment, then you should find him not guilty. But if you are convinced beyond a reasonable doubt from all of the evidence in the case of the guilt of the defendant then it is immaterial as to what the reputation was at any time as to their honesty and integrity, and you should return a verdict of guilty as charged.

You are instructed that a reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of like concern to himself as that before the jury, would allow to have an influence upon him, or make him pause or hesitate in arriving at his determination, but such doubts could be entertained only from the want of evidence to satisfy you beyond a reasonable doubt, or a doubt which is raised by the evidence, and should not be merely speculative, imaginative, or conjectural. If you are satisfied beyond a reasonable doubt, if from a candid consideration of the entire evidence which has been offered and admitted direct and circumstantial, he has an abiding conviction of the truth of the charge made.

You are instructed, gentlemen of the jury, that a defendant charged with a crime has the right to take the stand and testify in his own behalf, if he so desires; and if he does not take the stand and testify in his own behalf, no inference of guilt is to be taken against him. In your deliberations in this case, no inference is to be taken against the defendant, Glass, because he did not take the stand and testify in his own behalf.

You, gentlemen of the jury, are the sole judges of the



facts in this case; and you alone determine what the facts are. If I have referred to any fact in this case, it has not been done to indicate to you any opinion that I may have upon the facts, but simply in interpreting some proposition of law which is involved with the facts.

You are, likewise, the sole judges of the credibility of the witnesses who have testified before you, and it is for you to determine the weight or credit that you desire to attach to the testimony of any witness. You are to take into consideration the demeanor of the witnesses upon the witness stand, the opportunities or lack of opportunities they have for knowing the facts concerning which they have testified, the reasonableness or unreasonableness of the stories told by the witnesses who have appeared before you, and from all of the surrounding facts and circumstances in this case determine where the guilt or innocence in this case lies. You will likewise take into consideration the interest or lack of interest of any witness who has testified before you. You will apply to each witness who has testified before you the same tests that you would apply to any other person in the ordinary affairs of life whose truthfulness or veracity may be under consideration by you; and if you find any witness has wilfully testified falsely concerning any material fact in this case, you have the right to disregard his entire testimony, except so far as that may be corroborated by other facts and circumstances in evidence detailed or developed upon the trial in this case.

You will take into consideration all of the evidence that has been offered or admitted before you, and you will wholly disregard the statements of counsel upon both sides in presenting any issue to the Court upon any proposition of law which has been presented, or in the course of the argument of counsel to the Jury where the argument is not supported by the evidence; and you will, likewise, as I stated a moment ago, disregard any statement that I may have made in passing upon any proposition of law which was presented during the trial of this case, and determine this case solely upon the evidence which has been admitted before you, and the law which I have given to you.

You may in this case, find both defendants guilty, if you are convinced beyond a reasonable doubt that the government has proven every material allegation of the several counts in the indictment which were submitted to you; or



you may find them guilty of any one of several counts which you may find in the indictment, or you may find one defendant guilty and the other not guilty, or you may find both not guilty of all the counts.”

That thereafter, said Attorneys for said defendants, and each of them, excepted to the following portions of the Court’s charge, and to the refusal of the Court to charge the Jury as requested by said defendants; and said exceptions were by the Court duly allowed, to-wit:

#### EXCEPTION NO. IV.

The refusal of the Court to give defendants’ requested instruction No. 4, in the manner and form requested.

#### EXCEPTION NO. V.

The refusal of the Court to give defendants’ requested instruction No. 5, in the manner and form requested.

#### EXCEPTION NO. VI.

The refusal of the Court to give defendants’ requested instruction No. 6, in the manner and form requested.

#### EXCEPTION NO. VII.

The refusal of the Court to give defendants’ requested instruction No. 7, in the manner and form requested.

#### EXCEPTION NO. VIII.

The refusal of the Court to give defendants’ requested instruction No. 8, in the manner and form requested.

#### EXCEPTION NO. IX.

The refusal of the Court to give defendants’ requested instruction No. 9, in the manner and form requested.

#### EXCEPTION NO. X.

The refusal of the Court to give defendants’ requested instruction No. 10, in the manner and form requested.

#### EXCEPTION NO. XI.

The refusal of the Court to give defendants’ requested instruction No. 10 1-2, in the manner and form requested.

## EXCEPTION NO. XII.

The refusal of the Court to give defendants' requested instruction No. 11, in the manner and form requested.

## EXCEPTION NO. XIII.

The refusal of the Court to give defendants' requested instruction No. 14, in the manner and form requested.

## EXCEPTION NO. XIV.

The refusal of the Court to give defendants' requested instruction No. 18, in the manner and form requested.

## EXCEPTION NO. XV.

The refusal of the Court to give defendants' requested instruction No. 19, in the manner and form requested.

## EXCEPTION NO. XVI.

The refusal of the Court to give defendants' requested instruction No. 22, in the manner and form requested.

## EXCEPTION NO. XVII.

The refusal of the Court to give defendants' requested instruction No. 24, in the manner and form requested.

## EXCEPTION NO. XVIII.

The refusal of the Court to give defendants' requested instruction No. 28, in the manner and form requested.

## EXCEPTION NO. XIX.

That portion of the Court's instruction which submitted to the Jury the proposition that the defendants might be adjudged guilty of a depositing of mail matter with reference to a scheme similar to a lottery if the Jury should find that under the plan they had for the sale and disposition of the land that the defendants may, or might, reasonably have contemplated that eventually the lot owners themselves might resort to lot or chance for the distribution of the property.

## EXCEPTION NO. XX.

That portion of the Court's instructions in which the Court instructed the Jury to the effect that the executive head of the Jovita Land Company, or the executive officer of the company, or those occupying positions of supervision and control, might be or would be regarded, on account of their official positions, to have authorized the mailing of any such circular, matter, advertising matters, or letters, as the testimony may show had been mailed out from the company's offices in Seattle, as being an improper instruction to be given under the undisputed testimony in this case.

## EXCEPTION NO. XXI.

That portion of the Court's instructions with reference to the presumption arising from the mailing of letters or advertising matter or circulars from the offices of the Jovita Land Company, so far as the instructions make the act of any of the employees of the Jovita Land Company who may have mailed such circulars, advertising matter or letters the agents or representatives of the defendants or either one of them in this case, so as to make the defendants or either one of them responsible for the acts of such agent independent of whether there was any testimony from which the jury could conclude that such matter was mailed either with their knowledge or consent, or under their supervision and direction.

## EXCEPTION NO. XXII.

That portion of the Court's instruction which began with the statement that if the jury find the defendants were selling the property on the merits.

## EXCEPTION NO. XXIII.

That portion of the Court's instructions following, in which the Court indicated that the defendants might be convicted if the jury concluded from the testimony in the case that the plan of sale as contemplated in their contract did not contemplate the sale of the property upon the merits, for the reason that the said instructions was too limited in its application, and assumed that the parties purchasing property under the several contracts, were given the absolute right and power to make disposition of their own property after they had acquired it, and had the right to



make disposition after they acquired title to the property, were incapable of contracting or protecting their own interests.

#### EXCEPTION NO. XXIV.

That portion of the Court's instructions with reference to the circumstances under which the act or statements of one of these defendants might bind the other, as being fully inapplicable to the facts of this case, there being no evidence whatsoever that any of the acts or statements made by the defendant, Glass, or visa versa, were known to, or had ever been communicated to the defendant, Ridgway, nor was there any evidence to show that any statement made by either one of them had been made by such defendant in the presence of the other.

#### EXCEPTION NO. XXV.

That portion of the Court's instructions to the jury to the effect, that if the jury should find that the plan of sale and disposition of this property, as carried out by these defendants, might, in the judgment of the jury, have contemplated that a drawing might be had at the time the property was turned over to the lot buyers, and that the defendants turned over the property and withdrew, and if the jury believes that the plan contemplated that such a drawing might be conducted by the lot buyers, and that if it did eventuate in a drawing, notwithstanding the fact that the defendants withdrew, they would still be guilty of violating the statute.

Thereupon, the Jury retired, and after consideration, brought into the Court on the 24th day of December, A. D. 1913, a verdict, finding both of the said defendants, guilty, as charged, upon Counts Two (2), Three (3), Four (4) and Seven (7), of said indictment.

Thereafter the Court proceeded to, and did, pass sentence upon the said defendants, and each of them.

In pursuance of justice, and that right may be done, the defendant, R. E. Glass, presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

FRANK E. HAMMOND,  
Attorney for Defendant, R. E. Glass.

The foregoing Bill of Exceptions is correct, in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

Done in Open Court in the November, 1913, term thereof, and dated this 4th day of May, A. D. 1914.

JEREMIAH NETERER,  
Judge.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing Bill of Exceptions is correct in all respects and as such may be by the Court approved, allowed and settled as the Bill of Exceptions in said cause, and as such, filed in said cause and made a part of the record in said cause. Reserving the right to file a supplemental Bill in the event the same may be required.

Dated this 4th day of May, A. D. 1914.

CLAY ALLEN,  
United States District Attorney.

FRANK E. HAMMOND,  
Attorney for Defendant, R. E. Glass.

Indorsed: Bill of Exceptions. Filed in the United States District Court, Western District of Washington, May 4, 1914. Frank L. Crosbey, Clerk. By Ed M. Lakin, Deputy.

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In the United States District Court for the Western District  
of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

AT LAW.

ORDER ALLOWING WRIT OF ERROR.

Now on this 22d day of June, A. D. 1914, came the defendant, R. E. Glass, by his Attorney, F. E. Hammond, and filed herein and presented to the Court his petition, praying for the allowance of a Writ of Error intended to be urged by him, praying also, that a transcript of the record and pro-



ceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

NOW THEREFORE, Upon consideration of said petition, and being fully advised in the premises, the Court does hereby allow the said Writ of Error.

And it is hereby ordered, that a supersedeas and bail having been filed all proceedings in said cause towards the execution of said judgment, are hereby suspended until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And it is further ordered, that the defendant, R. E. Glass, having heretofore filed in this Court his supersedeas and bail bond, shall be released from custody, pending the hearing upon said Writ of Error in said United States Circuit Court of Appeals for the Ninth Circuit; and the United States Marshal of this District is hereby ordered and directed to release the said R. E. Glass, from custody, pending the final determination of said Writ of Error herein.

Dated this 22d day of June, A. D. 1914.

JEREMIAH NETERER,

Judge of the United States District Court for the Western District of Washington, Northern Division.

(SEAL)

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.



In the United States Circuit Court of Appeals for the Ninth  
Circuit.

R. E. GLASS, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

No. 2168

AT LAW.

WRIT OF ERROR.

United States of America, Ninth Judicial Circuit.—ss.

The President of the United States of America.

To the Honorable Judge of the District Court of the  
United States for the Western District of Washington,  
Northern Division, Greeting:

Because in the record and proceedings, as also in the  
rendition of the judgment, of a plea which is in the said Dis-  
trict Court, before you, between The United States of  
America, as plaintiff, and W. A. Ridgway and R. E. Glass,  
as defendants, a manifest error hath happened, to the great  
damage of said R. E. Glass, defendant, as by his complaint  
appears, we being willing that error, if any hath been, should  
be duly corrected, and full and speedy justice done to the  
parties aforesaid in this behalf, do command you, if judgment  
be therein given, that then under your seal, distinctly and  
openly, you send the record and proceedings aforesaid, with  
all things concerning the same, to the United States Circuit  
Court of Appeals for the Ninth Circuit, together with this  
Writ, so that you have the same at the City of San Francisco,  
in the State of California, in said Circuit, on the 20th day of  
July, A. D. 1914 next, in the said Circuit Court of Appeals  
to be then and there held, that the record and proceedings  
aforesaid being inspected, the said Circuit Court of Appeals  
may cause further to be done therein to correct that error,  
what of right, and according to the laws and customs of the  
United States, should be done.

WITNESS: The Honorable Edward D. White, Chief

Justice of the Supreme Court of the United States of America, this 22d day of June, A. D. 1914.

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed this 22d day of June, A. D. 1914, after plaintiff in error had filed with the Clerk of this Court with his petition for a Writ of Error, his Assignment of Errors.

(SEAL)

JEREMIAH NETERER,

Judge of the District Court of the United States for the Western District of Washington, Northern Division.

Indorsed: Original. No. 2168. In the Circuit Court of Appeals of the United States for the Ninth Circuit, R. E. Glass, Plaintiff in Error vs. United States of America, Defendant in Error. Writ of Error. Service of papers in this case to be made upon Frank E. Hammond, Attorney for R. E. Glass, at No. .... Street, Room, 602, Mut. Life Bldg., Seattle, Wash. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

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In the United States District Court for the Western District of Washington, Northern Division

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

AT LAW.

CITATION.

TO THE UNITED STATES OF AMERICA, GREETING:

You are hereby cited and admonished to be and appear at a Session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, in said Circuit, on the 20th day of July, A. D. 1914 next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein R. E. Glass, is plaintiff in error, and the United States of America, is defendant in error, to



show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS: The Honorable Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, Northern Division, this 22d day of June, A. D. 1914.

Seal

JEREMIAH NETERER.

United States District Judge for the Western District of Washington, Northern Division.

Service of a copy of the foregoing citation is hereby admitted this 22d day of June, A. D. 1914.

CLAY ALLEN,

United States District Attorney for the Western District of Washington, Northern Division.

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### RETURN ON SERVICE OF WRIT.

United States of America, Western District of Washington, Northern Division.—ss.

I hereby certify and return that I served the foregoing citation on the herein named United States of America, by handing to and leaving a duly certified, true and correct copy thereof, with Clay Allen, United States District Attorney for the Western District of Washington, Northern Division, at Seattle, in said District, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1914.

United States Marshal for the Western District of Washington, Northern Division.

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 22d day of June, 1914.

CLAY ALLEN,  
Attorney for Plaintiff.

Indorsed: Original. No. 2168. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. W. A. Ridgway and R. E. Glass, Defendants. Citation.



Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Service of papers in this case to be made upon Frank E. Hammond, Attorney for R. E. Glass, at No. — Street, Room 602 Mut. Life Bldg., Seattle, Washington.

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In the District Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

### ORDER TO TRANSMIT ORIGINAL EXHIBITS.

Upon stipulation of the plaintiff and defendants in the above entitled cause, it is hereby ordered that the Clerk of the above entitled Court, transmit to the United States Circuit Court of Appeals for the Ninth Circuit, as part of the record in the above entitled cause, all the original exhibits introduced in evidence at the trial of said cause, on behalf of the plaintiff and the defendants; and that said original exhibits be sent up in lieu of printed copies thereof.

Done in Open Court this 10th day of July, A. D. 1914.

JEREMIAH NETERER,

Judge.

O. K. ALLEN, Dist. Atty.

O. K. F. E. HAMMOND.

Indorsed: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 10, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

STIPULATION.

It is hereby stipulated by and between counsel for Plaintiff in Error and Counsel for Defendant in Error that all the exhibits in this cause, shall be transmitted to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, and that none of said exhibits shall be copied into the printed record or printed or reproduced, but that the originals shall be considered and treated as a part of the record in this case upon the hearing upon the merits of said appeal.

F. E. HAMMOND,  
Attorney for Plaintiff in Error.

CLAY ALLEN,  
Attorney for Defendant in Error.

Indorsed: Stipulation. Filed in the U. S. District Court, Western District of Washington, Northern Division, August 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

ORDER.

It appearing that it is impracticable to reproduce or print the exhibits received in evidence upon the trial of this cause, and that they should be transmitted to the Clerk of

the United States Circuit Court of Appeals for the Ninth Circuit to be used upon the consideration of the appeal in this cause, and it further appearing that the parties hereto have stipulated that same shall be so transmitted, and shall not be printed or reproduced, but that the originals shall be considered upon the hearing of the appeal in this cause;

It is therefore ordered that the exhibits introduced in evidence by Plaintiff in Error shall be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that same shall not be printed or reproduced, but that the originals shall be considered as a part of the record in this cause.

Done in Open Court this 3d day of August, A. D. 1914.

EDWARD E. CUSHAN,  
District Judge.

O. K. F. E. HAMMOND, Atty. for R. E. Glass.  
O. K. ALLEN, U. S. Atty.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Northern Division, August 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO  
EXHIBITS.

United States of America, Western District of Washington.  
—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, Northern Division, do hereby certify that the hereto attached sealed package contains Plaintiff's Exhibits 1 to 25, inclusive; 28 to 33, inclusive; 35, 37 to 45, 45-1, 45-2, 45-3, 45-4, 45-5, 46 to 49, inclusive; 51, 53 to 63, inclusive, and Defendants' Exhibits A and B, introduced and used upon the



trial of the foregoing cause, and that the said Exhibits are transmitted to the Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the record on appeal certified of even date herewith; that the said Exhibits are so certified and transmitted pursuant to the orders of the District Court made and entered in said cause July 10, 1914, and August 3, 1914, copies of which orders are attached to and made a part of this certificate, and copies of which said orders are also found on Pages 86 and 88 of said record on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 11th day of September, 1914.

FRANK L. CROSBY,  
Clerk.

By Ed M. LAKIN,  
Deputy.

(SEAL)

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

ORDER EXTENDING TIME TO TRANSMIT RECORD  
TO CIRCUIT COURT OF APPEALS.

Now on this 21st day of July, 1914, upon motion of attorney for Plaintiff in Error and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 27th day of August, 1914.

JEREMIAH NETERER,  
District Judge.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

ORDER EXTENDING TIME TO TRANSMIT RECORD  
TO CIRCUIT COURT OF APPEALS.

Now on this 18th day of August, 1914, upon motion of attorney for Plaintiff in Error and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 18th day of September, 1914.

O. K. WINTER S. MARTIN, Asst. U. S. Attorney.  
August 18th, 1914.

JEREMIAM NETERER,  
District Judge.

Indorsed: Order Extending Time to Transmit record to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, August 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

STIPULATION AS TO RECORD AND EXHIBITS.

IT IS HEREBY STIPULATED, by and between the parties hereto by their respective Counsel:

I.

That the following designated papers comprise all the papers, exhibits, depositions or other proceedings which are necessary to the hearing of said cause upon Writ of Error

in the United States Circuit Court of Appeals, and that none but such papers need be included in the records of said Court:

- A. Indictment.
- B. Demurrer.
- B-2. Opinion of Court on Demurrer.
- B-3. Amended Order Overruling Demurrer (June 17, 1912).
- C. Arraignments.
- D. Pleas.
- E. Verdict.
- F. Judgment.
- G. Sentence.
- H. Petition for Writ of Error.
- I. Assignments of Error.
- J. Bill of Exceptions.
- K. Order allowing Writ of Error.
- L. Writ of Error.
- M. Citation.
- N. Summons and Severance.
- O. Stipulation as to Record and Exhibits.
- P. Order to attach Original Exhibits.
- Q. Supersedeas Bond of R. E. Glass.

## II.

LL

That the Original Exhibits in this cause may be attached to the record by the Clerk, and forwarded to the Circuit Court of Appeals, and it shall not be necessary to print said Exhibits in the Record.

Dated this 10th day of July, A. D. 1914.

CLAY ALLEN,  
United States District Attorney.

F. E. HAMMOND,  
Attorney for Defendant, R. E. Glass.

Indorsed: Stipulation as to Record and Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 10, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.



In the District Court of the United States for the Western  
District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO  
TRANSCRIPT OF RECORD, ETC.

United States of America, Western Dist. of Washington.—  
ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 97, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein to the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making record, certificate or return—280 folios at 30c.....	\$ 84.00
Certificate of Clerk to transcript of record, 3 folios at 30c .....	.90
Seal to said Certificate.....	.40
Certificate of Clerk to Original Exhibits, 3 folios at 30c .....	.90
Seal to said Certificate .....	.40
Statement of Cost of printing said transcript of record, collected and paid .....	102.00
	<hr/> \$188.60

I hereby certify that the above cost for preparing, certifying and printing said record amounting to \$188.60, has been paid me by F. E. Hammond, Esq., attorney for Plaintiff in Error.

I further certify that I hereby attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 11th day of September, 1914.

(SEAL)

FRANK L. CROSBY,  
Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

R. E. GLASS, Plaintiff in Error,

VS.

UNITED STATES OF AMERICA, Defendant in Error.

AT LAW No. 2168

WRIT OF ERROR

United States of America, Ninth Judicial Circuit.—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between the United States of America, as plaintiff, and W. A. Ridgway and R. E. Glass as defendants, a manifest error hath happened, to the great damage of said R. E. Glass, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, in said Circuit, on the 20th day of July, A. D. 1914 next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS: The Honorable Edward D. White, Chief



Justice of the Supreme Court of the United States of America, this 22nd day of June, A. D. 114.

FRANK L. CROSBY,  
Clerk of the United States District Court for the Western  
District of Washington, Northern Division.

Allowed this 22nd day of June, A. D. 1914, after  
plaintiff in error had filed with the Clerk of this Court with  
his petition for a Writ of Error, his Assignment of Errors.

JEREMIAH NETERER,  
Judge of the District Court of the United States for the  
Western District of Washington, Northern Division.

(Seal)

Indorsed: Original No. 2168. In the Circuit Court  
of Appeals of the United States for the Ninth Circuit.  
R. E. Glass, Plaintiff in Error, vs. United States of America,  
Defendant in Error. Writ of Error. Service of papers in  
this case to be made upon Frank E. Hammond, Attorney  
for R. E. Glass at No. ——— Street Room 602 Mut. Life  
Bldg. Block, Seattle, Washington. Filed in the U. S. Dis-  
trict Court, Western Dist. of Washington, June 22, 1914.  
Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

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In the United States District Court for the Western District  
of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. A. RIDGWAY AND R. E. GLASS, Defendants.

No. 2168

AT LAW

CITATION

TO THE UNITED STATES OF AMERICA, GREET-  
ING:

You are hereby cited and admonished to be and appear  
at a Session of the United States Circuit Court of Appeals  
for the Ninth Circuit, to be holden at the City of San Fran-  
cisco, in the State of California, in said Circuit, on the 20th  
day of July, A. D. 1914, next, pursuant to a writ of error

filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein R. E. Glass, is plaintiff in error, and the United States of America, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jeremiah Neterer, Judge of The United States District Court for the Western District of Washington, Northern Division, this 22nd day of June, A. D. 1914.

Seal

JEREMIAH NETERER,  
United States District Judge for the Western  
District of Washington, Northern Division.

Service of a copy of the foregoing citation is hereby admitted this 22 day of June, A. D. 1914.

CLAY ALLEN,  
United States District Attorney for the Western  
District of Washington, Northern Division.

## RETURN OF SERVICE OF WRIT

United States of America, Western District of Washington  
Northern Division.—ss.

I hereby certify and return that I served the foregoing citation on the herein named United States of America, by handing to and leaving a duly certified, true and correct copy thereof, with Clay Allen, United States District Attorney for the Western District of Washington, Northern Division, at Seattle, in said District on the ..... day of ....., A. D. 1914.

.....  
United States Marshal for the Western District  
of Washington, Northern Division.

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 22 day of June, 1914.

CLAY ALLEN,  
Attorney for Plaintiff.

Endorsed: Original No. 2168. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. W. A. Ridgway and R. E. Glass, Defendants. Citation, Service of papers in this case to be made upon Frank E. Hammond, Attorney for R. E. Glass, at No.....Street.....Room 602 Mut. Life Bldg. Block, Seattle, Washington. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.





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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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R. E. GLASS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

No. 2485

WRIT OF ERROR FROM THE UNITED  
STATES DISTRICT COURT FOR WEST-  
ERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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HONORABLE JEREMIAH NETERER, *Judge.*

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*BRIEF OF PLAINTIFF IN ERROR.*

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F. E. HAMMOND, Esq.,  
*Attorney for Plaintiff in Error.*

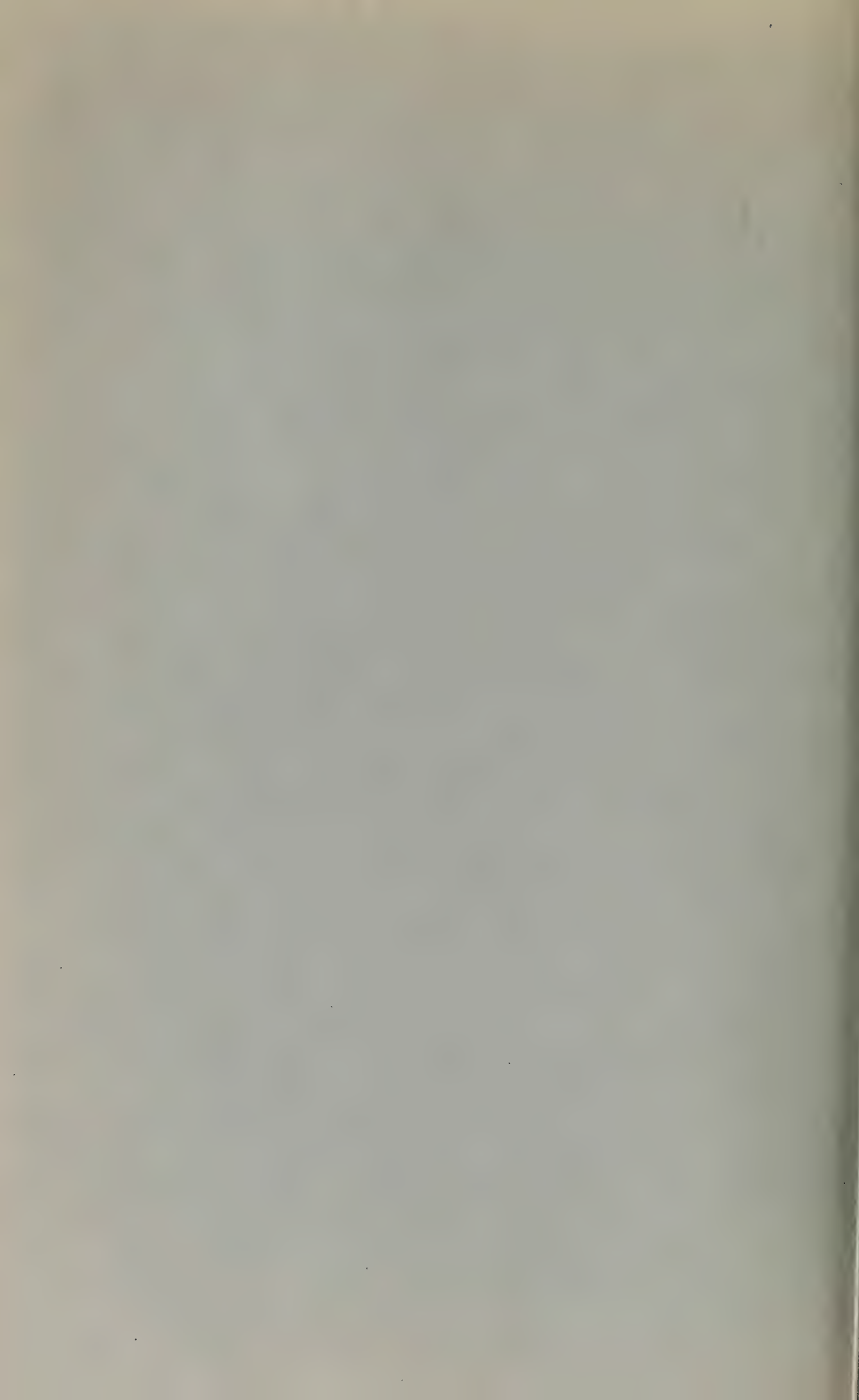
Mutual Life Building,  
Seattle, Washington.

Filed

KLEMPNER & BOYCE

FEB 4 - 1915

F. D. Monckton,





IN THE

**United States**

**Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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R. E. GLASS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

No. ....

WRIT OF ERROR FROM THE UNITED  
STATES DISTRICT COURT FOR WEST-  
ERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

---

HONORABLE JEREMIAH NETERER, *Judge.*

---

***BRIEF OF PLAINTIFF IN ERROR.***

---

F. E. HAMMOND, Esq.,  
*Attorney for Plaintiff in Error.*

Mutual Life Building,  
Seattle, Washington.



IN THE

**United States**

**Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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R. E. GLASS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

No. ....

WRIT OF ERROR FROM THE UNITED  
STATES DISTRICT COURT FOR WEST-  
ERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

---

HONORABLE JEREMIAH NETERER, *Judge.*

---

***BRIEF OF PLAINTIFF IN ERROR.***

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STATEMENT OF THE CASE.

On the 20th day of May, 1912, an indictment was returned charging the defendants, Ridgway and Glass, jointly with having violated Sec. No.



3894 of Revised Statutes, and Sec. No. 213 of the Penal Code of 1910 (Act March 4, 1909).

There are ten counts in the indictment (p. 3 Tr.), the wording of all of which is identical, except as to the composition of the mail matter alleged to have been deposited in the post office establishment. A demurrer was sustained as to counts one (1) and five (5) as being barred by the statute of limitations (Opinion Judge Cushman, p. 23 Tr.) and denied as to all other counts. To which ruling the defendants excepted (p. 48 Tr.). Upon the second trial of the case no evidence was introduced as to counts six (6), eight (8), nine (9) and ten (10), and the court (Judge Neterer) instructed the jury to return a verdict of "Not Guilty" upon said counts (p. 63 Tr.).

The only counts of the indictment upon which evidence was introduced were the second (2), third (3), fourth (4) and seventh (7). (Instruction, p. 63 Tr.)

The indictment (p. 3 Tr.) is as follows (omitting formal parts):

"That heretofore, to-wit: On or about the 13th day of April, 1909, one W. A. Ridgway and one R. E. Glass, at the City of Seattle, County of King, State of Washington, within the Western District of Washington and within

the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said City of Seattle, to be sent and delivered by the post office establishment of the United States, a certain circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said circular was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said circular so far as can be represented and set forth herein, omitting therefrom certain pictures and designs, was as follows:

(We omit copying the circulars, as they are different in each count.)

And which said scheme hereinbefore referred to was as follows:

That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Land Company, a corporation, certain vacant, unimproved lands with King County, in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita; which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon twelve of said lots, thereby rendering said lots of more value than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said

lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of One Hundred and Thirty (\$130.00) Dollars each, but at the time of such sale the lot or lots so purchased should not be identified, but after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees, and that after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.”

On June 19, 1913, the defendants were arraigned, pleaded not guilty and went to trial (P. 29 Tr.). This trial was had before Judge Cushman and resultel in a disagreement of the jury.

On December 19th, 1913, the defendants were again put upon trial before Judge Neterer (P. 48 Tr.). The material testimony introduced was as follows, and is copied from the agreed statement in the Transcript (P. 48 to 56 inc. Tr.):

That the defendants, Ridgway and Glass, in the latter part of 1908, on behalf of themselves and other persons, caused to be incorporated, the Jovita Land Company; That the Jovita Land Company acquired



a tract of land between the City of Seattle and Tacoma, Washington, containing about five hundred (500) acres; This property or addition was designated as "Jovita," and was, by the Jovita Land Company, platted into lots and blocks, there being 2713 lots and tracts ranging in size from 40x120 feet to 2½ acres; That after purchasing the property, the Jovita Land Company, proceeded to improve the property by clearing the land, building houses, grading streets, building sidewalks, and otherwise making the property attractive; That the lots and tracts as finally delivered to the purchasers were of unequal size and value; That after platting the land, the Jovita Land Company, of which the defendant, W. A. Ridgway, was President, and the defendant, R. E. Glass, was Secretary and Treasurer, proceeded to sell the land upon contract, each interest in the tract of land being sold for the uniform price of One Hundred and Thirty Dollars (\$130.00) each.

In selling the land an undivided interest was sold to each purchaser, and at the time of the sale, the particular lot or lots which the purchasers agreed to buy, were not known or designated, and it was agreed in the contract, which was introduced in evidence as the Government's Exhibit No. Twenty-three (23), that after all the land had been sold, the purchasers or their representatives should meet upon the

property and at that time, the Jovita Land Company would deliver to the purchasers, or their representatives, deeds to all the property so sold by the Jovita Land Company and purchased by the lot buyers, at which time the lot buyers could divide the property among themselves.

For the most part the letters and circulars set forth in the indictment and other literature, were sent out through the mail at times subsequent to the initial contract payments.

That prior to the 4th day of July, 1910, the Jovita Land Company caused notice to be given to the alleged lot buyers of the selection and appointment of certain representatives who would act for the contract holders and who were requested to meet on said date and be present on the land of the company; that on the date last mentioned a meeting was had at which were present these representatives, together with many other contract holders of the company, several hundred in number. Between 8:00 or 9:00 o'clock in the morning the defendant, W. A. Ridgway, announced to the purchasers there assembled that the Jovita Land Company was ready to turn over the deeds to the Trustees whom might be chosen by the people there assembled. By viva voce vote five Trustees were chosen from among the per-

sons present. These Trustees were then called forward, and the defendant, W. A. Ridgway, delivered to these Trustees deeds to each and every lot or tract of the property sold, and took their receipt for the same. These deeds covering substantially all of the 2713 lots to be distributed had, prior to the drawing, been prepared and signed and acknowledged by the defendant, W. A. Ridgway. These deeds were executed in blank form as to the name of the grantee in each case. On the day of the drawing many of these deeds so prepared were by the employes of the company at the time filled in and actually distributed to the grantees selected by lot at the drawing and thereafter from time to time the remaining number of deeds were sent through the mails and distributed from the offices of the Company to the various and numerous alleged purchasers in various parts of the district and surrounding country. After these deeds were delivered to the Trustees, the defendant, Ridgway, withdrew from any further participation in the subsequent proceedings and went to Tacoma, Washington, but subsequently during the day returned to the property. The defendant, Glass, was present at his home, but not personally present at the drawing.

That the defendant, R. E. Glass, was almost continually during the existence of the Jovita Land



Company from its inception down to the day of the drawing and for some time thereafter present in both the offices of the company and on the land of the company at Joivta. The location of the land at Jovita is at a distance of approximately twenty-five miles from the City of Seattle, and approximately twelve miles from the City of Tacoma, and situated on an interurban line of railway running between Seattle and Tacoma, affording rapid and convenient means of transportation. The Jovita Land Company secured and used during its existence ample and complete office accommodations in the City of Seattle, and in this office a room was set apart for R. E. Glass for his occupation and use as it might be required by him. The defendant, R. E. Glass, together with the defendant, Ridgway, were by all the employes of the company recognized as the directing officers. The employes, Bacharach and Lyons, together with all the other employes of the company, took their orders from either the defendant, Glass, or the defendant, Ridgway. The defendant, Ridgway, was seldom in the City of Seattle prior to the drawing, while the defendant, Glass, was continually and constantly in the City of Seattle, or on the property during the life of the company.

Immediately after the defendant, Ridgway, had

delivered the deeds to the five Trustees selected by the purchasers, the said five Trustees, so selected, proceeded to divide the property among the purchasers, by drawing lots therefor, in the following manner:

The name of each purchaser had prior to the day of the drawing been written upon separate cards and placed in a box, which revolved upon an axis; upon other cards had been written the description of each lot or tract of ground contained in the five hundred (500) acres, known as "Jovita," and placed in another similar box; that is to say: If there were 2713 lots sold, there were 2713 names put in one box and in another box there were placed 2713 cards, on each of which was written the description of a lot. These five Trustees then drew one name from one box and at the same time drew a card containing the description of a lot from the other box, and the purchaser whose name was drawn from one box was given a deed to the property described on the card drawn from the other box at the time his name was drawn.

The evidence connecting the defendants, Glass & Ridgway, with the transmission through the mail of the literature offered in evidence, as well as the specific letters and literature mentioned in the indict-

ment, was circumstantial and tending to support a knowledge on their part of the general character of the literature and letters. No direct evidence was offered that Glass and Ridgway personally deposited the letters or literature mentioned in the indictment in the mail or requested that these particular letters should be sent through the mail. The employees in the office testified that the defendants did not request them to send through the mail the particular letters and literature mentioned in the indictment. There were some ten employees maintained in the offices, and these employees had charge of the mailing of all matters sent from the office. The letters and circulars set forth in the indictment and introduced in evidence were matters which were sent out in the ordinary routine of the office. The defendant, Ridgway, was in the City of Seattle and Tacoma but a very few times, he residing in Spokane, several hundred miles away from the office. The defendant, Glass, made his home upon the property, and superintended the improvements that were being made upon the property, and when he came to Seattle he would come in on the Interurban, go to the office, sign the checks or attend to what might be absolutely necessary, and leave upon the next Interurban for the property; the Interurban train leaving every hour.



The witness, Salzer, testified that within the week prior to the drawing the defendant, Glass, handed to the witness a diagram of a platform and boxes, and requested him to construct upon the land of the defendant, Jovita Land Company, a platform which was afterwards used at the time of the drawing; the writing upon the diagram furnished was in the hand writing of Lyons, an employee. The witness, Salzer, testified that a few days prior to the drawing the defendant, Glass, asked witness to construct two revolving boxes of unusual design, the construction of which boxes was, at the instance of defendant, Glass, concealed from all the other employees. The boxes constructed by the witness, Salzer, were set upon the platform constructed by him and were actually used as boxes from which were drawn the names of the owners and the numbers of the lots on the day of the drawing. All of the persons who handled the deeds and tickets, after the tickets had been drawn from the boxes by the Trustees selected at the drawing, and who performed the physical work of filling them out and delivering them to the grantees on the date of the drawing, were employees of the company who were directed in the office of the company to be present on the Jovita land on the day of the drawing.

The defendant, Ridgway, called a meeting to order at the time of the drawing and was personally present during a good portion of the day. All of the witnesses for both sides agreed that at the time the meeting was called to order, tickets upon which had been previously inscribed twenty-seven hundred and thirteen names, and other tickets upon which had been inscribed twenty-seven hundred and thirteen different pieces of property, were present and ready for use upon the morning of the drawing. No witness for either the government or the defense gave any explanation of the source from which the tickets had come.

The witness, McCash, called for the government, testified that prior to the drawing he had a conversation with the defendant, Glass, and the defendant, Glass had stated to the witness, McCash, that the customary way to dispose of lots under the circumstances was by drawing.

The evidence submitted by the government of various witnesses, including the real estate expert called, established the cost of the entire property, together with the comparative cost of the tracts as distributed, showing a variation from five to ten dollars an acre in the case of a great majority of the lots to one of an approximate value of five to six

thousand dollars, each tract of which of this wide disparity of value was distributed to the twenty-seven hundred and thirteen buyers upon a consideration which was in all cases the same, that is, one hundred and thirty dollars each.

A Mr. Bacharach was bookkeeper and in charge of the Seattle office, and a Mr. Lyons was in charge of the advertising, and a Miss Potts was the head stenographer and in charge of all routine correspondence and in charge of the office in the absence of Mr. Bacharach.

C. A. Stokes was called as a witness on behalf of the Government, who being sworn, testified that he had owned the property platted by the Jovita Land Company and known as "Jovita," and had negotiated with F. E. Hammond for the sale of the property, and had in the latter part of 1908 made a contract to sell the land to R. E. Glass, and placed in escrow deeds to the property, and after receiving full payment for the land, deeds conveying the land direct to the Jovita Land Company were delivered to the Jovita Land Company.

The witness was then asked to testify as to the amount of money he was paid for the land. To which interrogatories the defendants, and each of them duly objected, and objected to the introduction



of any evidence as to the purchase price of the land, paid by the Jovita Land Company, for the reason that it was irrelevant and incompetent and was offered for the purpose of prejudicing the minds of the Jury. The objections of the defendants were by the Court overruled. (P. 54 Tr.) To which ruling the defendants, and each of them, duly excepted, and their exceptions were allowed. The witness then testified that he had received One Hundred and Twenty Thousand Dollars (\$120,000.00) for the land and improvements.

During the progress of the trial the Government called Adolph Behrans, who being sworn, testified that he had been in the real estate business in the City of Seattle for twenty-one (21) years, and at the request of Mr. Allen, United States District Attorney, he had, within the past ten days, examined the property sold by the Jovita Land Company. He was then interrogated as to the value of the land and the character of the soil at the time he made his investigation, for Mr. Allen, to which interrogatories the defendants, and each of them, then and there objected, and objected to the introduction of any evidence relative to the value of the land at the time of the said examination of the same by the witness, for the reason that it was incompetent, irrelevant

and offered for the purpose of prejudicing the Jury; which objections the Court overruled, and the said defendants, and each of them thereupon excepted to said ruling, and their exceptions were allowed. P. 54 Tr.) The said witness testified that said land was of the value of not to exceed Sixty-five (\$65.00) Dollars per acre, and the forty (40) foot lots were not worth to exceed Five (\$5.00) Dollars or Ten (\$10.00) Dollars each, and the cottages upon the property could be built from Six Hundred (\$600.00) Dollars to One Thousand (\$1000.00) Dollars each. That the values in July, 1910, were but slightly less.

The Government then called as a witness upon its behalf, David Young, who being sworn, testified that he had been in the real estate business in the City of Seattle for about nine (9) years; that he had examined the property in company with the witness, Adolph Behrans, at the request of the United States District Attorney. He was then asked to give the value of the property and its general conditions, to which interrogatories the defendants, and each of them, objected, and objected to the introduction of any evidence as to the value of the land, for the reason that the evidence was incompetent and irrelevant and offered for the purpose of prejudicing the Jury; which objections were by the Court overruled,

and the defendants, and each of them thereupon excepted, and their exceptions were allowed. P. 54 Tr.) The witness then testified that in his opinion the land was worth not to exceed the sum of Seventy-five (\$75.00) Dollars per acre, and that the forty (40) foot lots were worth not to exceed Four (\$4.00) Dollars or Five (\$5.00) Dollars each.

Carrie M. Buck, a witness called on behalf of the Government, testified that she had received through the postoffice establishment of the United States the literature set forth in Count Two (2) of the indictment, and the same was introduced in evidence as Government's Exhibit Fifty-five (55).

George Spicher and H. Giesy were called as witnesses on behalf of the Government, and testified to having received through the postoffice establishment of the United States the letter referred to in Count Seven (7) of the indictment, and the same was admitted in evidence as the Government's Exhibit Twenty-five (25).

Subsequent to the testimony of the said witnesses, Buck, Spicher and Giesy, the Government called as a witness Ira C. Luman, and the Government offered to prove by the said witness, Ira C. Luman, that he had received through the United States mails the literature referred to in Count



Three (3) of the indictment, and the literature referred to in Count Four (4) of the indictment, whereupon the defendants, and each of them objected to the introduction of any evidence as to Counts Three (3) and Four (4) of the indictment, for the reason that the said Count Two (2) and Count Seven (7) of the indictment, concerning which evidence had already been introduced by the Government, were based upon the law as in force prior to January, 1910, making the offense charged against the defendants a misdemeanor; whereas, the offense charged in Counts Three (3) and Four (4) of the indictment is a felony, and is based upon the law as in force subsequent to January, 1910, and the Government having proceeded to prosecute the defendants upon Counts Two (2) and Seven (7) of the indictment, for a misdemeanor, could not, also, prosecute the defendants in the same indictment for a felony. The Court overruled the objections of the defendants, and the defendants, and each of them thereupon excepted to the ruling of the Court, and their exceptions were allowed. (P. 55 Tr.) The witness then testified that he had received through the United States mail the literature in Counts Three (3) and Four (4) of the indictment, and the same was introduced in evidence as the Government's Ex-

hibit Sixty-three (63) and Sixty (60), respectively. (P. 48 to 56 inc., Tr.).

The defendants filed with the Court certain proposed instructions, which the Court refused to give, as set out on pages 56 to 61 inc. of Tr., to which refusal the defendants excepted. (P. 77 and 78 Tr.).

The Court instructed the Jury, as shown on pages 61 to 77 inc. of Tr., to parts of which instructions the defendants took exceptions as contained on pages 78 to 80 inc. of Tr.

The Jury returned a verdict of guilty on Counts Two (2), Three (3), Four (4) and Seven (7). (P. 29 Tr.).

The judgment of the Court was that the Plaintiff in Error, Glass, be confined in the King County Jail for sixty (60) days on each count, to be served concurrently, and pay a fine of Three Hundred (\$300.00) Dollars on each count, totaling Twelve Hundred (\$1200.00) Dollars. (P. 30 Tr.).

The original exhibits, consisting of literature alleged to have been prepared by the Company, including the various mail matter set out in the indictment, were by stipulation and order of Court, sent up in lieu of printed copies. (P. 86 and 87 Tr.).

The defendant, Glass, removed this case to this

Court by Writ of Error, and filed with his petition therefor his Assignments of Error. (P. 35 Tr.).

Summons and severance was duly served upon the defendant, Ridgway, but he has not joined in this appeal. (P. 33 Tr.).

## SPECIFICATIONS OF ERRORS.

### THE COURT ERRED:

#### I.

In overruling the demurrer of said defendants to the indictment filed against them in this cause.

#### II.

In holding and deciding over the objections of said defendants, that said indictment states facts sufficient to constitute a crime or offense against the United States or the laws thereof.

#### III.

In holding and deciding over the objections of said defendants, that the several counts of said indictment, or that any of said counts states facts sufficient to constitute a crime or offense against the United States or the laws thereof.



## IV.

In holding and deciding over the objections of said defendants, that said indictment was sufficient in law.

## V.

In holding and deciding over the objections of said defendants, that Counts 2, 3, 4, 6, 7, 8, 9 and 10 of said indictment were sufficient in law, and in holding that any of said counts were sufficient in law.

## VI.

In holding and deciding over the objection of said defendants, that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against said defendants, and permitting over the objections of said defendants, evidence to be introduced thereunder against said defendants as to Counts 3 and 4, after the introduction of evidence as to Count 2 of said indictment.

## VII.

In overruling the objections of said defendants to the introduction of evidence, and in admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 55, purporting to be a letter from the Jovita Land Company to Carrie M. Buck,

and being the letter mentioned in plaintiff's Count 2 as having been unlawfully deposited in the United States Postoffice Establishment, contrary to law; said letter being in words, letters and figures as follows, to-wit:

"Payment No. 4                      Seattle Wash.,  
M— Carrie M. Buck,  
212 S. Washington Ave.,  
Centralia, Wash.

The next monthly payment of Ten Dollars on your Jovita Lot will be due on June 16th, 1909, and is payable at our Main Office, 219 Epler Block, Seattle, Wash.

Kindly remit by check, postoffice money order or express money order.

Yours truly,

JOVITA LAND COMPANY."

VIII.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 63, the same having been offered after the introduction in evidence of Exhibit No. 55 and Exhibit No. 25; said Exhibits No. 55 and No. 25 being letters alleged to have been deposited in the United States Postoffice Establishment, con-

trary to law, and set forth in the indictment as Counts 2 and 7 respectively, said Counts 2 and 7 being founded upon the law as in force prior to January 1st, 1910, and Count 3 of said indictment being founded upon the law as in force after January 1st, 1910. Said Exhibit No. 63 purporting to be a letter and receipt from the Jovita Land Company, and being the letter and receipt set forth in Count 3 of the indictment, as having been unlawfully deposited in the Postoffice Establishment of the United States.

### IX.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, of plaintiff's Exhibit No. 25, the same purporting to be a letter from the Jovita Land Company to George Spicher and H. Geisy, and being the letter set forth in Count 7 of said indictment, and alleged to have been unlawfully deposited in the Postoffice Establishment of the United States.

### X.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, plaintiff's Exhibit No. 60, the same purporting to be a



letter from the Jovita Land Company, bearing no address, but alleged to have been contained in an envelope addressed to Ira G. Luman, said Exhibit No. 60 being set forth in Count 4 of the indictment, and alleged to have been unlawfully deposited in the Postoffice Establishment of the United States.

## XI.

In giving the following as part of its instructions:

“In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their acts by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and handed to a trustee before the drawing, and that the defendants took no part in such drawing.”

## XII.

In giving the following as part of its instructions:

“If the defendants devised this scheme for the distribution of the property for the purpose and with the intention and understanding that people would be attracted by it and would be induced to purchase interests or shares for the reasons, among other things, that in the drawing by resort to lot at which every contractor or shareholder would have a chance to draw a more

valuable piece of property, as well as a smaller piece of property, if you find beyond a reasonable doubt that they did devise and further such plan for such a purpose, and with such intent and understanding, and that such scheme was that described in the indictment, then you may find that they were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though you find they contemplated withdrawing and did actually withdraw from participation in the enterprise before the drawing was held, and that they took no part in the drawing."

### XIII.

In giving the following as part of its instructions:

"You are further instructed in this connection that every sane person is presumed to intend the natural and logical consequences of his voluntary act; that is, if the defendants or either of them, in the conduct of this service must have contemplated that the United States mail would have to be used in the correspondence with the contracting parties for the purchase of an interest in this land, and that their, or either of their employees under general directions sent out this mail matter as that is described in the indictment, then you would be justified in finding, if the evidence is sufficient to convince you beyond a reasonable doubt, that they did cause those things to be mailed, although they did not direct any one particular piece of mail to be sent to a particular addressee."

## XIV.

In giving the following as part of its instructions:

“If you find that they were trustees in the Jovita Land Company, and executive and managing heads, and exercised an active supervision and control over the corporation’s affairs, they would be responsible for any general directions given in relation to the mailing of literature, whether they personally gave the directions to mail or not.”

## XV.

In giving the following as part of its instructions:

“Were they in good faith simply selling undivided interest in properties of which they were possessed, with no other inducement to purchasers than the value, or supposed value of the property or the merits thereof, or were they in bad faith, and under cover of legal form, knowingly and in reality appealing to the weakness of the passion prevalent in human nature, the gambling spirit, by which many people are easily induced to invest or to risk comparatively small sums upon the chance of winning a prize of much greater value.”

## XVI.

In giving the following as part of its instructions:

“You are instructed that the law does not, as a rule, permit proof to be given of what one



man has said or done in order to affect the matter. One can only be affected by what he has said or done himself. What one has said or done cannot be evidence against another unless he was acting with the other's authority, or in accordance with a plan which was adopted by both the parties which was common to both or all, and in which they were interested. When a thing which the parties have been doing separately and apart from each other, and in the interest of a common plan or purpose, or if you find that there was a common plan or purpose, can only be explained on the theory that they were acting in pursuance of such plan which they had previously adopted, and which was well understood, it may be found that they had previously adopted the plan disclosed by the evidence and which led to the result as described. One question, therefore, in this case is, whether the acts of the defendants when considered in their relation to one another, do fairly and convincingly indicate that they were acting in pursuance of a common plan and purpose, and that the defendants, Glass and Ridgway, were acting with relation to such plan, and to the advancement of a common plan and purpose in the advertisement and disposal of the property referred to in the indictment, and concerning which testimony has been received; and if these acts so fit together and match each other that the only reasonable explanation of them is that they were acting for and on behalf of each other and according to a well-understood and well-defined plan, if you are convinced by the evidence that such is the fact, then you may consider the act or the statement of one in furtherance of such a common plan as you may find, if any, to have been adopted as against the other defendant, whether the other defendant was present at the

time of the statement or at the time of the action or not, at the time the statement was made, or at the time that the act was done, or whether they were not."

### XVII.

In refusing to give the defendants' proposed Instruction No. 4, which was as follows:

"I instruct you, gentlemen of the jury, that the scheme concerning which the law forbids any letters or circulars to be deposited in the mails is such a scheme as is similar to a lottery and offering prizes to those who participate in said scheme, the ultimate ownership of which prizes must depend upon lot or chance."

### XVIII.

In refusing to give the defendants' proposed Instruction No. 5, which was as follows:

"I instruct you that any number of persons may buy jointly a tract of land in any condition and subsequently divide it among themselves by drawing lots, and the persons selling them the land, even though he knew they intended to divide it by a drawing or otherwise, would not commit a crime if he deposited or caused to be deposited any mail mater relative thereto in the Postoffice of the United States similar to that set forth in the indictment in this case."

### XIX.

In refusing to give the defendants' proposed Instruction No. 6, which was as follows:

"I instruct you that in determining whether

there was a lottery or other similar scheme of chance devised or carried out; that where two or more persons who are the owners of undivided lots of land determine or arrange to apportion their respective interests therein among themselves, and the plan of so apportioning or dividing the same is by casting lots and thereby ascertain and apportion to each his interest in severalty by chance or lot, this is not a lottery or similar scheme of chance as contemplated by the law, for, the law contemplates that, in a lottery or other similar scheme, the title to the prize or property has not yet passed to the purchaser or person entitled to the chance and that it is by lottery or similar scheme of chance that the purchasers obtain the property or so-called prizes, and the law contemplates that the title, at the time of the lottery or other similar scheme of chance was had or held, was in some other than the purchaser or person taking the chance, and that the right which was held by the parties expecting or seeking prizes was merely a right to participate in the lottery or drawing, with the understanding or agreement, express or implied, that, thereafter, there would be conveyed or transferred to him the prize or property which might, by reason of such lottery or similar scheme, fall to him by reason of such drawing or scheme. That in all lotteries, or similar schemes of chance, as defined by law, there must be some party or parties holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance."

## XX.

In refusing to give defendants' proposed Instruction No. 7, which was as follows:



“You are instructed that at the time the Jovita Land Company delivered deeds to the lots buyers all title to the land, houses and other improvements passed from the Jovita Land Company to the lot buyers and the lot buyers were then the absolute owners and entitled to the possession and control of the property; that thereafter all the lot buyers owned an undivided interest in each and every house or part or parcel of land, which included the alleged prizes alleged to have been offered; that upon the delivery of said deeds all control over the subsequent disposition of said property passed from said Land Company, or these defendants, and any purchaser, if he wished, could have gone into the State Court and had the land partitioned equitably among them or they had the right to divide it among themselves by lot.”

## XXI.

In refusing to give defendants' proposed Instruction No. 8, which was as follows:

“You are further instructed that at the time of the execution of each contract of sale of an undivided interest, the purchaser became the owner of an undivided interest in the land, houses and other improvements owned by the Jovita Land Company, and as long as the purchaser made his payments the Land Company could not divest him of his title and the purchaser's title was as complete in the alleged prizes as in the unimproved land; in other words, you are instructed that the purchasers from the time of their purchase at all times owned the alleged prizes, as well as the unimproved land and small tracts, and these pur-

chasers after obtaining title could lawfully allot their land among themselves as they might agree, without any control or interference upon the part of the defendants."

## XXII.

In refusing to give defendants' proposed Instruction No. 9, which was as follows:

"You are further instructed that if the said purchasers had refused to allot their land by lot, chance or drawing, the Jovita Land Company could not have compelled them to hold a drawing, nor could the Jovita Land Company have held any drawing or apportionment that would have been binding upon the lot buyers."

## XXIII.

In refusing to give defendants' proposed Instruction No. 10, which was as follows:

"This brings you to the consideration of the second question, viz.: Did the defendants, Ridgway and Glass, devise a scheme in connection with the sale of the land by which a drawing was to be conducted under their supervision, or that of their authorized agents and employees, as charged by the Government; or did the defendants, as claimed by them, simply sell to various and sundry persons undivided interests in the land platted by Jovita Land Company, leaving it to the purchasers themselves to partition said lots among themselves as they saw fit? Contracts of sale for said land have been exhibited to you, which it is claimed the Land Company executed, which contracts purported by their terms to sell but an undivided interest

in the land platted, and which provided further that the several purchasers should meet and partition the land as they saw fit. These contracts further provide that no selling agent has any power to alter or change their terms. The defendants further deny that they or either of them at any time authorized any agents to vary, change or modify the terms of such contracts, and deny any knowledge that any such agent had ever attempted so to do. The defendants further deny that they or either of them had anything whatever to do with any drawing or the division of said lots, and deny that the plan therefor was their plan, or that they supervised it, or that the same was supervised with their knowledge or consent by any agent or employee of theirs or of said Land Company.

You are accordingly instructed that if you find that defendants did in good faith sell undivided interests in the property platted by said Land Company, and that the plan of allotment was not their plan, but a plan adopted and carried into effect by the purchasers for the purpose of partitioning the property among themselves, your verdict must be for the defendants."

#### XXIV.

In refusing to give defendants' proposed Instruction No. 10 $\frac{1}{2}$ , which was as follows:

"If, however, on the other hand, you should find that there was a lottery scheme offering prizes and that it was the scheme of the defendants, or either of them, and that they or either of them sold the property to the several purchasers in contemplation that the same would be allotted by chance and that thereafter



a drawing was held prior to the transfer of title from the Land Company to the purchasers and that the defendants or either of them arranged and supervised such drawing or caused the same to be done, and that in connection with the sale of said property the defendants, or either of them, within three years prior to May 20, 1912, deposited or caused to be deposited in the United States mails letters and circulars as alleged by the Government for the purpose of furthering and aiding such scheme, then I instruct you the defendants would be guilty of the crime charged, and in this connection I instruct you that the delivery of deeds to the authorized representatives of the purchasers would be the same as a delivery of the deeds to the actual purchasers of the lots."

## XXV.

In refusing to give defendants' proposed Instruction No. 11, which was as follows:

"I instruct you that unless you can find that the defendants personally deposited the mail matter or directed some one else to do so you must acquit the defendants."

## XXVI.

In refusing to give defendants' proposed Instruction No. 12, which was as follows:

"You are instructed that it is not a crime to deposit a letter or circular concerning a lottery that has been held. To illustrate: Suppose a lottery has been held and, in writing a letter to a friend or acquaintance, you mention the fact that a lottery has been held; you would in that

case not be violating the law, although the letter would be in a sense ‘concerning a lottery.’ Nor is it a crime to deposit or cause to be deposited a letter concerning a legitimate allotment of land or property among the owners thereof. To illustrate: If the various owners of a tract of land decide to divide it among themselves by a drawing or a casting of lots, that would be a legitimate allotment or lottery, and it would not be a crime to deposit or cause to be deposited in the Postoffice a letter or circular concerning such a lottery or plan, even though the letter was one which was promoting the scheme or plan of distribution and the tracts of land to be divided were of unequal value.”

## XXVII.

In refusing to give defendants’ proposed Instruction No. 14, which was as follows:

“I instruct you that the law presumes that the Jovita Land Company and the purchasers intended to carry out their contract in a lawful manner and the Government must overcome this presumption by evidence that convinces you beyond a reasonable doubt, and it is presumed by law that all parties connected with the sale or purchase of the land believed and contemplated that after the delivery of the deeds the land would be partitioned among men in a legitimate manner.”

## XXVIII.

In refusing to give defendants’ proposed Instruction No. 18, which was as follows:

“I instruct you that the mere fact that these defendants were officers of the corporation

known as the Jovita Land Company is not of itself sufficient to prove that they knew that there was in existence a scheme similar to lottery, being conducted by the Jovita Land Company, nor is it sufficient to prove that they deposited or caused to be deposited the letters or circulars set forth in the indictment."

### XXIX.

In refusing to give defendants' proposed Instruction No. 19, which was as follows:

"The mere reception of the matter, alleged to have been deposited in the mail, by the person to whom it was addressed, would not of itself establish the fact that defendants deposited or caused to be deposited such matter in the mails."

### XXX.

In refusing to give defendants' proposed Instruction No. 20, which was as follows:

"You are instructed that if you find from the evidence that at or about the time the Jovita Land Company began the sale of its lots, these defendants, or either of them consulted with lawyers for the purpose of advising them or either of them as to whether or not the sale of land under the contracts in evidence was legal and not in violation of law, and that said defendants, or either of them, were advised by counsel learned in the law that it would not be in violation of law to sell their land under such contracts, and that if the said Land Company and these defendants did not participate in the allotment of the land that neither the company or these defendants would be violating the law,



regardless of what the purchasers might do, then and in that case your verdict should be an acquittal of these defendants, or either of them."

### XXXI.

In refusing to give the defendants' proposed Instruction No. 22, which was as follows:

"I instruct you that the defendants in this case are entitled to the individual opinion of each member of the jury as to their guilt or innocence, and if any juror entertains a reasonable doubt as to their guilt of any one of the necessary elements of the crime charged he should not vote for a verdict of guilty merely because any other or other jurors, even a majority of them, believed the defendants guilty."

### XXXII.

In refusing to give defendants' proposed Instruction No. 24, which was as follows:

"You are instructed that there is nothing contained in the letters or circulars set out in the indictment that is even suggestive of a scheme similar to a lottery offering prizes dependent upon lot or chance, nor on their face are they concerning such a scheme.

Standing alone, by themselves, the defendants would commit no crime by depositing in the mails such letters or circulars, therefore, you must look to other evidence to determine if the said letters and circulars are concerning a scheme similar to a lottery, as charged in the indictment."

In refusing to give defendants' proposed Instruction No. 28, which was as follows:

"I instruct you that if from the evidence or statements of Counsel you have gained the impression that the Jovita Land Company or either of these defendants lost money or gained money by reason of the alleged transactions, you must entirely disregard it for any purpose for the reason that whether they gained or lost by the transaction has nothing to do with the case; neither does it make any difference whether or not the property sold by the Jovita Land Company was worth the amount it was sold for. There is no charge of fraud in the indictment against these defendants and there is no evidence upon which you would be justified in presuming any fraud."

#### XXXIV.

In pronouncing a judgment against the said defendants, and each of them.

#### ARGUMENT.

Specifications of error One (1) to Ten (10) inclusive will be considered under the one head.

Specifications Six (6) to Ten (10) inclusive deal with the introduction of evidence, but the same question was raised upon demurrer, as it appears upon the face of the indictment.

#### *Error in Overruling Demurrer.*

Counts Two (2) and Seven (7) of the indict-

ment are founded upon Sec. 3894 of R. S., as they allege the crime was committed in the year 1909 and are misdemeanors.

Counts Three (3) and Four (4) are founded upon Sec. 213 of the Penal Code, as they allege the crime was committed subsequent to January 1st, 1910, when Sec. 213 went into effect, and are felonies.

*Section 3894 R. S.*

“No letter, post card or circular concerning any lottery, so-called gift-concert, or other similar enterprise offering prizes dependent upon lot or chance \* \* \* shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter-carrier. \* \* \* Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than \$500, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense.”

*Section 213 Penal Code.*

“No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent *in whole or in part* upon lot or chance \* \* \* shall be deposited in or carried by the mails of the



United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of the provisions of this Section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than \$1000, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

The objections to the Indictment are:

First: That there is a misjoinder of offences, that is, a felony has been joined with a misdemeanor.

Second: The crimes charged under Section 213 of the Penal Code (Counts Three (3) and Four (4)) being felonies (Sec. 335 Penal Code), the indictments must specifically allege in what manner the letters alleged to have been deposited *concerned* a scheme similar to a lottery offering prizes, inasmuch as the letter itself contains no words concerning any lottery or similar scheme.

*U. S. vs. Noelke*, 1 Fed. 426, 432.

This case was decided under the old statute, but applies to this point.

Third: It is not specifically alleged that the defendant knew the letters were concerning a scheme

*offering prizes*, or that he knew the contents of the sealed envelope or the letter, he not having written the letter, and not being the person alleged to be conducting the alleged scheme. The scienter should be specifically alleged.

Fourth: Each count is bad for duplicity. The defendants being each indicted jointly and accused of “*depositing*” and “*causing to be deposited*,” two separate crimes are charged.

Fifth: The alleged scheme as set out in the indictment is not a scheme similar to a “lottery,” or “gift-enterprise,” *offering prizes* dependent upon lot or chance, within the meaning of the Statute. The scheme as set out in the indictment being a straight sale of real estate with a contract among the purchasers to partition the land among themselves.

By comparing Section 3894 of R. S. with Section 213 of the Penal Code it will be noted that so far as this indictment is concerned the only difference seems to be that Section 3894 was a misdemeanor, while Section 213 is a felony, and the further difference that in Section 3894 it is provided that: No leter, etc., concerning any lottery, so-called gift-concert or other similar enterprise offering prizes “*dependent upon lot or chance*” could be carried in the mail; while in Section 213 it was

provided that: No letter, etc., concerning any lottery, gift-enterprise or similar scheme offering prizes dependent *in whole or in part* upon lot or chance, could be deposited in or carried by the mails. In other words, under Section 3894 R. S. the prizes offered must depend *entirely upon lot or chance*, while under Section 213 of Penal Code the prizes offered might be dependent *in whole or in part upon lot or chance*. The proof required under Section 3894 R. S. would be different than the proof required under Section 213 of Penal Code, and the Court in its instructions (P. 63 Tr.) instructed the jury that *all* the counts in the indictment were based upon Section 213 of the Penal Code, and then proceeded to quote the section to the jury; whereas, the indictment was founded, not only upon Section 213, but upon Section 3894 of R. S. The indictment does not charge in any count that the scheme depended “in whole or in part” upon lot or chance. These words are omitted in each count.

Upon the trial of the cause the Government introduced its evidence first as to Counts Two (2) and Seven (7), which were founded upon Section 3894 R. S., being a misdemeanor (P. 55 Tr.). Thereafter the Government offered evidence as to Counts Three (3) and Four (4), which was based upon Section 213



of the Penal Code, the same being a felony. (P. 55 Tr.) Sec. 335, Penal Code.

Objections were made to the introduction of the evidence as to Counts Three (3) and Four (4), as the Government had elected to prosecute the defendants under Section 3894 R. S. The objections were overruled by the Court, and evidence received as to Counts Three (3) and Four (4). (P. 55 Tr.)

The indictment shows upon its face that a misdemeanor and felony were joined, and plaintiff in error contends that the demurrer should have sustained for that reason:

“If a count for felony is joined with a count for a misdemeanor, the indictment will be held bad if demurred to, or judgment may be arrested if the verdict has been general; (i. e. guilty or not guilty on the whole indictment).”

*1st Ed. Amer. & Eng. Ency. L.* (Note) p. 755, Vol. 4.

*U. S. vs. Gaston* (1886), 28 Fed. 848, citing many cases.

*McElroy vs. U. S.*, 17 Sup. Court Rep. 31 (1896).

“There is no objection to stating the same offense in different ways, in as many different counts of the indictment as you may think neces-

sary, even although the judgment on the several counts be different, provided *all* the counts be for *felonies* or *all* for misdemeanors.”

*U. S. vs. Howell*, 65 Fed. 402 (1895), Judge Morrow.

See also *Painter vs. U. S.*, 151 U. S. 396; 14 Sup. Ct. 410 (1894).

“Conceding that regularly and usually an indictment should *not* include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different *felonies*, at least of the same *class* or *grade*, and subject to the *same* punishment, is not *necessarily* fatal to the indictment upon demurrer.”

*Painter vs. U. S.*, 151 U. S. 396; 14 Sup. Ct. 410 (1894).

The Painter case was one in which two felonies were joined in separate counts in one indictment.

Under Sec. 1024 R. S. several counts may be joined in the same indictment:

1st: “Where there are several charges against any person for the *same* act or transaction.”

2nd: Where there are “two or more acts or transactions connected together”;

3rd: Where there are “two or more acts

or transactions of the same *class of crimes* or offenses.”

4th: In each case the acts or transactions must be such as “may be properly joined.”

*McElroy vs. U. S.*, 17 Sup. Ct. Rep. 31.

However, if the Court should hold that it was proper to join in the same indictment a misdemeanor with a felony, surely at the time of the trial, when the Government had elected to prosecute the defendants under the misdemeanor, it was error for the Court to subsequently permit the introduction of evidence as to a felony.

*Richardson vs. The State*, 63 Ind. 192.

It is not contended that one charged with a felony cannot be convicted of a lesser crime if included within the felony, but it is contended that two separate crimes of a *different class*, one a felony and one a misdemeanor, cannot be joined in the same indictment in separate counts.

“In most of the States and Territories, by Constitution or Statute all crimes, or at least statutory crimes, not capital, are classed as felonies, or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the State prison or penitentiary.”

*Mackin vs. U. S.*, 117 U. S. 348, 29 L. Ed. 909.



An analysis of Sections 3894 of R. S. and 213 of Penal Code discloses that there are three things concerning which mail matter shall not be “deposited in,” “carried by” or “delivered by” the Postoffice Establishment:

1st: “Lottery.”

2nd: “Gift-enterprise.”

3rd: Similar schemes *offering prizes*, dependent (in whole or in part) upon lot or chance.

No mail matter concerning either of the three foregoing enterprises is allowed to be:

1st: “Deposited in” or

2nd: “Carried by the mails of the United States” or

3rd: “Delivered by any post-master or letter-carrier.”

The words “deposited in” are not found within the prohibitive part of Section 3894 of R. S., but both Section 213 of Penal Code and Section 3894 of R. S., are substantially the same in providing that whoever shall knowingly “deposit” or “cause to be deposited,” or “deliver” or “cause to be deliv-

ered'' by mail, anything ''in violation of the provisions of this Section,'' shall be punished.

## SCIENTER.

In the present case the Government has *attempted* to accuse the plaintiff in error of having deposited or caused to be deposited certain mail matter concerning a *scheme* similar to a lottery (offering prizes dependent upon lot or chance). These are the words of Section 3894, R. S., and not the words of Section 213 of the Penal Code. The wording of Sec. 213 of Penal Code being ''dependent *in whole or in part* upon lot or chance.'' The defendant is not even accused of depositing any mail matter concerning a scheme similar to a *lottery* or *gift-enterprise* offering prizes dependent upon lot or chance. It will be observed by examining the Statute that it is *the prizes*, which must be *dependent* upon *lot* or *chance*, which the law refers to. It is not the *scheme* that must be dependent upon lot or chance, but the *prizes*. In other words, it would be no offense to deposit a letter concerning a *scheme* dependent in whole or in part upon lot or chance, unless the scheme is similar to a lottery or gift enterprise and is a scheme *offering prizes*. The in-

dictment in this case charges that the defendants did:

“Wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited \* \* \* a certain circular concerning a certain *scheme* dependent upon lot or chance, then and there being operated and conducted \* \* \* by a corporation called Jovita Land Company.”

It is nowhere charged that the plaintiff in error *knew* the letter deposited was concerning a scheme (offering prizes), nor that he knew that it was a scheme *similar to a lottery or gift enterprise*. The mail matter set out in the indictment does not appear to have been written by the plaintiff in error, and surely no one has the temerity to claim that, if the plaintiff in error did not know the scheme was *offering prizes*, that he would have committed an offense by merely depositing or causing the mail matter to be deposited in the post office establishment.

“Every ingredient of which the offense is composed must be accurately and clearly alleged.”

*U. S. vs. Cook*, 17 Wall. 174, 21 L. Ed. 538.

*U. S. vs. Cruikshank*, 92 U. S. 524, 23 L. Ed. 588-593.

*U. S. vs. Kelsey*, 42 Fed. 882.



“No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially or by way of recital.”

*U. S. vs. Hess*, 124 U. S. 483, 486, 31 L. Ed. 516.

The indictment in this cause omitted to set forth one of the most essential ingredients of the offence, that of charging the scheme was one similar to a lottery or gift enterprise and was one *offering prizes*. The indictment should specifically state that the defendant *knew* that the contents of the letter concerned a scheme *offering prizes* dependent (if under Section 3894, R. S.) upon lot or chance; or (if under Section 213 of the Penal Code) dependent *in whole or in part upon lot or chance*, and that the said scheme was one similar to a lottery or gift enterprise, especially is this true when the letters were not written by the defendants, nor were they conducting the scheme, but the scheme was being conducted, as alleged in the indictment, by a corporation known as “*Jovita Land Company*.” The indictment before the court contains no such specific allegation, and when the defendant went to trial, he could not have been convicted by merely

proving the allegations of the indictment, but the Government had to go further and prove this “guilty knowledge” upon the part of the defendant.

The plaintiff in error further contends that the demurrer should have been sustained for the reason that the scheme set forth in the indictment and relied upon by the Government, is not a scheme similar to a lottery *offering prizes* dependent in whole or in part upon lot or chance.

#### SPECIFICATIONS OF ERROR 11, 12, 23 AND 24.

These specifications of error raise the question as to whether, under the indictment, it was error for the court to instruct the jury, in substance, that they could find the defendants guilty, even though the drawing was not conducted “under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees,” and even though said drawing took place *after* the deeds conveying the property had been delivered to the purchasers. This seems clearly to be error. The indictment (P. 3 Tr.) specifically charged that “after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser, by

lot or chance, which said drawing was to be conducted on said property *under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees,*" that after said drawing a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him"; as a matter of fact if we eliminate from the indictment the accusation that the drawing was to be conducted under the supervision of the defendants or their agents, and the further allegation that the deeds were to be delivered *after* the drawing, the indictment would be clearly demurrable. An analysis of the indictment which describes the *scheme* which is supposed to be similar to a lottery offering prizes dependent upon lot or chance shows:

1st: The defendant should acquire in the name of a corporation certain vacant and unimproved real estate. (The corporation would then, of course, own it.)

2nd: The land was to be platted into lots and blocks. (Naturally the lots would be of unequal value.)

3rd: Twenty-four (24) houses of different value were to be built upon as many different lots.

4th: The corporation who operated the scheme



was to offer said lots *for sale* for One Hundred and Thirty (\$130.00) Dollars.

5th: At the time of such *sale* the lot or lots so purchased should not be identified.

6th: But after all of said lots were sold, a drawing should be had by which the said lots should be parceled out to each purchaser by lot or chance.

7th: The drawing was to be conducted on said property under the supervision of the defendants, Ridgeway and Glass.

8th: Deeds were afterwards to be issued to each purchaser, conveying to him the lot so drawn by him.

The defendant contends that under all the rules of "criminal law," it was incumbent upon the government to prove that the drawing or distribution of this property was conducted under the *supervision* of the *defendants* and *their agents and employes*.

The evidence in the trial of the case (P. 50 Tr.) was that, "The defendant, Glass, was at his home but not personally present at the drawing," and that "on the day of the drawing, between eight and nine o'clock in the morning, the defendant, Ridgeway, announced to the purchasers there as-

sembled, that the company was ready to turn over the deeds to the Trustees who might be chosen by the people there assembled, (this was provided for in the contracts, Govt. Ex. 23). By *viva voce* vote five Trustees were chosen from among the persons present. These Trustees were then called forward and the defendant, Ridgway, delivered to these Trustees, deeds to each and every lot or tract of the property sold, and took their receipt for the same. After these deeds were delivered to the Trustees, the defendant, Ridgway, withdrew from any further participation in the subsequent proceedings, and went to Tacoma, Washington, but subsequently, during the day, returned to the property." (P. 50 Tr.). "Immediately after the defendant, Ridgway, had delivered the deeds to the five Trustees selected by the purchasers, the said five Trustees so selected, proceeded to divide the property among the purchasers, by drawing lots therefor, in the following manner (P. 51 Tr.):

It is clear that under the evidence as produced at the trial, the defendants would have been acquitted had the court instructed the jury that the Government must prove the allegations in the indictment, viz., that before the jury could convict, the defendants and their agents must be proven to have

supervised the drawing. On the contrary, the court gave as part of its instructions the following (P. 67 Tr.):

“In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their act, by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and tendered to the Trustees before the drawing; that the defendant took no part in such drawing.”

Again, on page 69 Tr., the court instructed the jury that:

“Under certain conditions the jury must find that they (the defendants) were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though the jury should find they (the defendants) contemplated withdrawing, and did actually withdraw from participating in the enterprise before the drawing was held, and that they took no part in the drawing.”

It is quite clear that these instructions took from the jury, entirely, the question presented by the indictment, as to whether or not the drawing was conducted under the supervision of the defendants and their agents.

The court refused to give the instructions asked



for by the defendant, and set forth in the Specifications of Error 23 and 24.

The defendant was entitled to rely upon the allegations in the indictment that the *scheme* as set forth in the indictment was *the scheme* concerning which the mails were used, and it was error for the court to withdraw *that scheme* from the consideration of the jury and substitute another therefor. An acquittal under this indictment would not be a bar to a subsequent indictment accusing the defendants of depositing the same letter concerning the scheme as *proven* in the trial, but not *set forth* in this *indictment*.

If the indictment is sufficient and does set forth a scheme similar to a lottery offering prizes dependent upon lot or chance, yet, the court erred in refusing to give the instructions as set forth in

#### SPECIFICATIONS OF ERROR 17, 18, 19, 20, 21 AND 22.

These specifications of error, which are instructions the court refused to give, are deemed by plaintiff in error as quite important, as they cover the proposition that the scheme as proven by the evidence was not a scheme *offering prizes* dependent upon lot or chance.

It is contended that the plaintiff in error, Glass, and his co-defendant, Ridgway, could, on behalf of themselves and other stockholders, have purchased a tract of land in the name of "Jovita Land Company"; could have sub-divided it into tracts of unequal size, built houses upon some of the tracts, and offered the land to the public for sale, and could have sold undivided interests in the tract to as many people as there were sub-divisions of the plat, and could have had an arrangement or understanding with the people who bought the undivided interests, that when all the land was paid for, the corporation would deliver deeds to the representatives of the people who had bought those interests, and that thereafter the people who had bought the undivided interests could divide the land among themselves by a drawing or in any other manner they might see fit.

Indeed the court instructed the jury (P. 67 Tr., bottom of page) that under a proper interpretation the contracts (Exhibit 23) entered into between the Jovita Land Company and the purchasers does not provide for a drawing or distribution by resort to lot or chance, and in itself the instrument implies nothing illegal or wrong on the part of the defendants.

The contention of plaintiff in error being that

no *prizes* of any kind, *dependent* in whole or in part upon lot or chance, were ever *offered* or given under this arrangement or under the evidence as introduced at the trial. The Government contended that the prizes consisted of the houses upon the land; or, that by reason of one tract being larger than another and of more value, it thereby constituted a prize. The plaintiff in error contends that when said corporation sold the undivided interests in the tract of land, those undivided interests carried with them the title to the houses and all the improvements put upon the property. If the plaintiff in error and the "Jovita Land Company" had *withheld* from the purchasers anything to be given to someone holding a lucky number after a drawing or division of the property had been made, it would have been a different matter, and they would have been offering a prize to someone who drew a certain number; but *after* the land was all *sold* and when the corporation had *delivered the deeds* to the Trustees, appointed by the purchasers themselves, the corporation held back *nothing* to give to anyone after the division had been made, and there was no *prize* of any kind ever offered or given. Therefore, it was essential that the drawing, as alleged in the indictment, should have been under the *supervision and direction* of the



*defendants*, their *agents* and *employes*, and something should have been retained by them as a *prize* to be given to the person who drew a lucky number. If no *prizes* were offered or given, then, the United States mails could be used concerning this transaction, because the scheme or plan would not be one similar to a lottery, *offering prizes* dependent upon lot or chance. Therefore, it was error for the court to refuse to instruct the jury, as set forth in Specification No. 17, that the scheme about which the law forbids the use of the United States mails, "is such a scheme as is similar to a lottery and *offering prizes* to those who participate in said scheme, the ultimate ownership of which prizes must be dependent upon lot or chance"; and as set forth in Specification No. 18, "that any number of persons might buy, jointly, a tract of land, divide it among themselves by drawing lots and the person selling them the land, even though they knew they intended to divide it by drawing or otherwise, would not commit a crime if he *deposited* or *caused to be deposited* in the post office establishment of the United States any mail matter relative thereto.

And as set forth in Specification No. 19, that, "in all lotteries or similar schemes of chance, as defended by law, there must be some party or parties

holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance.”

And as set forth in Specification No. 20, that, the delivery of the deeds by the ‘Jovite Land Company’ to the purchasers passed the title to the land, houses and other improvements upon the property, and that the purchasers of the property could have controlled the subsequent disposition of the property in any manner they might see fit.”

And as in Specification No. 21, that, “from the time of the execution of the contracts and as long as the purchaser made his payments the equitable title to the alleged prizes, as well as in the unimproved land was in the purchasers, and that the purchasers could allot the land among themselves as they might agree, without any control or interference upon the part of the defendants.”

And as in Specification No. 22, that, “the purchasers could have refused to allot their land by lot, chance or drawing, and neither the defendants nor the Land Company could have compelled them to have held the drawing.”

The evidence in the case discloses the fact that

after the sale of the land, deeds to the property were delivered to the purchasers *prior* to any drawing, and neither the defendants in the case nor the Land Company had anything further to do with the division of the property among the purchasers, except that *after the drawing* some of the office force of the Land Company, other than the defendants, assisted in some of the clerical work.

#### SPECIFICATIONS 13, 14, 15, 25 AND 28.

The plaintiff in error (Specification No. 25), requested the court to instruct the jury that unless it could find that the defendants personally deposited the mail matter, or directed someone else to do so, the jury should acquit the defendants.

This instruction should have been given for the reason that the indictment in effect charges them with *personally depositing* the letters or mail matter. The words in the indictment "or caused to be deposited" were of no force as the indictment did not state the names of the persons who were *caused to deposit* the letters, or that their names were to the Grand Jury unknown.

*U. S. vs. Simmons*, 96 U. S. 360.

And further requested the court to instruct (Specification No. 28), that the mere fact that the



defendants were officers of the corporation would not have been sufficient of itself to prove that the defendants deposited or caused to be deposited the letters or circulars set forth in the indictment. These instructions were by the court refused, and in lieu thereof the court instructed the jury (Specification No. 13), that if either of the defendants in the conduct of the business must have contemplated that the mails were to be used in corresponding with the contracting parties for the purchase of the land, and that their employes under general directions sent out the mail matter, the jury would be justified in finding that the defendants caused those things to be mailed, although they did not direct any particular piece of mail to be sent. And further (Specification No. 14), that if the defendants were Trustees of the "Jovita Land Company," and executive and managing heads and exercised an active supervision and control over the corporation's affairs, they would be responsible for any general directions given in relation to mailing of literature, whether they personally gave the directions to mail or not.

The plaintiff in error believes that prejudicial error was committed in refusing to give the instructions asked and in giving the ones herein referred to.

## SPECIFICATION 16.

This part of the court's instruction gave the jury to understand that anything that either of the defendants did would be binding upon the other. The position of the plaintiff in error, Glass, is that after the land was sold, he had nothing further to do with the delivery of the deeds or the distribution of the property. The evidence (P. 50 Tr.) discloses, that after the sale, on the day the deeds were delivered and the drawing had, the plaintiff in error, Glass, was not at the drawing, nor did he participate in the delivery of the deeds, nor in any other part of the procedure. He was at his home and took no part whatever; while the defendant, Ridgway, was present, delivered the deeds, but before the drawing, withdrew and went to Tacoma, Washington. Anything that the defendant, Ridgway, may have stated at that time, or at any other time, would not have been binding upon the plaintiff in error, Glass.

## SPECIFICATION NO. 31.

The court refused to instruct the jury that the defendants were entitled to the individual opinion of each member of the jury as to their "guilt" or "innocence," and that no juror should vote for

conviction merely because some other member of the jury believed the defendants "guilty."

### SPECIFICATION NO. 33.

In view of the evidence given by the real estate men called by the Government (P. 54 Tr.), which was as to the cost of the land and the value of the land, it was error for the court to refuse to instruct the jury that if the jury had gained the impression that the plaintiff in error, Glass, and his co-defendant, Ridgway, lost or gained money by reason of the alleged transactions, the jury should disregard it. The court had admitted in evidence, testimony which shows that a large quantity of land (2,713 tracts at \$130.00 each) had been sold for approximately Three Hundred Fifty-two Thousand Dollars (\$352,000.00); that this land, not including the improvements put on after purchase, had only cost the corporation something like One Hundred Twenty Thousand Dollars (\$120,000.00) (Evidence of Stokes, p. 53 Tr.), and the insinuations of the District Attorney and the purpose of the evidence was to get into the minds of the jury the thought that these defendants had made a vast fortune out of this real estate transaction, when as a matter of fact, after paying salesmen, employes, improvements, etc.,



the company that owned the land lost money. The admission of this evidence and the refusal of the court to give defendants' proposed instructions, was prejudicial error. The real estate men testified the lots were not worth over \$5.00 each, which would make the 2,713 lots worth about \$13,565.00. So far as the issues in the case were concerned, it made no difference whether the land cost much or little. The only question was whether or not these defendants caused to be deposited in the post office establishment of the United States, any mail matter concerning a scheme similar to a lottery *oeffring prizes* dependent upon lot or chance, and the evidence of the real estate men was prejudicial to the plaintiff in error.

#### SPECIFICATION 34.

The court erred in ordering the defendant confined at *hard labor*, as the statute does not authorize such punishment. The punishment prescribed by both Section 3894, R. S., and Penal Code, 213, is a fine or imprisonment or both.

*In re James S. Wilson*, 114 U. S. 417, 29 L. Ed. 89.

*Mackin vs. U. S.*, 117 U. S. 348, 29 L. Ed. 909.

It is respectfully submitted the cause should be reversed and dismissed.

F. E. HAMMOND,  
*Attorney for Plaintiff in Error.*





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IN THE  
**United States Circuit Court**  
**of Appeals**  
FOR THE  
**NINTH CIRCUIT**

R. E. GLASS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

No. 2485

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN DIVISION.

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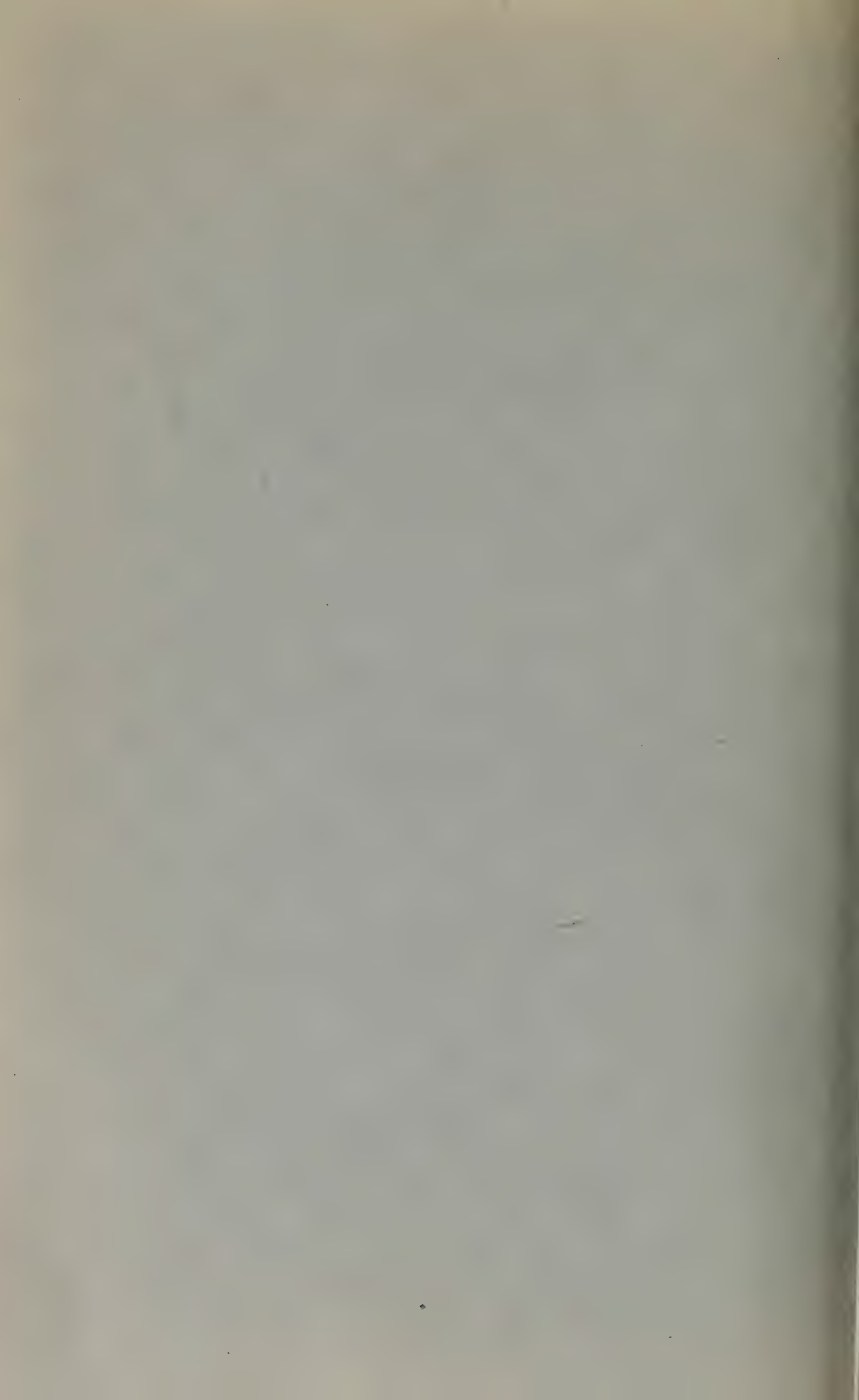
**Brief of Defendant in Error**

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CLAY ALLEN,

*United States Attorney.*

Seattle, Washington.



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**Brief of Defendant in Error**

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STATEMENT OF THE CASE.

The brief of F. E. Hammond, Esq., counsel for plaintiff in error, filed herein has set out with much detail the history of the cause now brought to the attention of this court. The bill of excep-



tions contains a statement of the case which has met with the approval of counsel representing both the plaintiff and defendant in error. The plaintiff in error and his co-defendant, W. A. Ridgway, prior to the time the Jovita Land Company came into existence, had successfully promoted an enterprise similar to that described herein in the State of Montana. Both of these defendants were interested in this original enterprise and so successful had it been that they were encouraged to set on foot a similar venture within this district. A considerable acreage of land was obtained upon a contract from one C. A. Stokes. This was procured and purchased by the two defendants, paying a small sum down and by a subsequent delivery of the entire consideration or purchase price, which amounted approximately to one hundred and twenty thousand dollars (\$120,000). The acreage originally purchased and that which was used in the sale of the Jovita Land Company, herein considered, was something over five hundred (500) acres. The land having been procured, the defendants, through various agents, servants and employees, set about causing the land to be improved in some measure by the clearing of useless timber

and opening of roadways upon the property. The land was surveyed into something over three thousand (3,000) lots, a majority of which were approximately 30x120 feet. Many of the lots, however, were of much wider dimensions, some providing for as much as two to ten acres in area. From the very beginning of the enterprise and throughout its entire history, occupying in the case of the Jovita Land Company, something more than one year, the purpose and plan of the promoters was apparent to the numerous persons solicited to become interested in the proposition. Offices were procured in Seattle and Tacoma and elsewhere. From these offices a perfect stream of literature began to issue and out of these same offices worked a numerous and industrious list of agents. In addition to the use of the mails, these agents were provided with an unlimited quantity of seductive literature, similar in kind to the numerous samples disclosed in the record. Reference to the exhibits will illustrate to the court the alluring and seductive nature of the promises held forth to the various people importuned to become interested in the enterprise. Practically all of the literature sent through the mails and furnished to the agents contains

covert and muddy hints of the great good fortune which somewhere in the future was beckoning to the prospective real estate investor. Due to the energy of the defendants and their various and numerous representatives, something over twenty-seven hundred (2,700) persons were induced to "take a chance" and invest in this mysterious and suggestive scheme. In each case the "chance" was charged for in the sum of one hundred and thirty dollars (\$130). In return for this the defendants and their company gave to the prospective purchasers, according to the explanation which they now make, and to each of those purchasers, an undivided one twenty-seven hundredth ( $1/2700$ ) of the real property of the Jovita Land Company. The explanation of the defendants, as made by counsel to the jury, and by counsel to this court, is that these defendants were foisting upon the courts of this community the burden of untangling the common ownership of twenty-seven hundred owners in one piece of property.

Sales were made to all classes of persons, many of whom for the first time in their lives were to assume the role of real estate investors. These



various persons, or at least many of them, conceded that the only ground for their newly awakened interest in real estate investments was the element of chance involved in securing from this company a tract of land upon which had been constructed by the company and the defendants a more or less substantial dwelling. Not content with the dissimilarity in size and value occasioned by the system of platting adopted, the defendants sought to heighten and increase the disparity between the highest and lowest of the "lucky lot buyers" by the construction upon certain favored tracts of ground of cottages and houses, ranging in value from five hundred dollars to the grand prize known as the Stokes house, which was estimated to have cost the sum of ten thousand dollars (\$10,000). Sales were consummated to these numerous purchasers upon terms best calculated to ensnare the poor and the uninformed. Payments in the sum of ten dollars (\$10) on each "chance" of one hundred and thirty dollars (\$130) were received, and monthly payments thereafter provided for upon such terms as would best suit the prospective buyer. After the sale of the maximum number of "chances" and the receipt of the major portion of the purchase price through

the monthly payments hereinbefore mentioned, notice was given through the channels of the various agencies established and maintained by the company that a meeting would be held upon the land of the company at a certain date specified, at which meeting action would be taken looking to the distribution of the property of the company. Preliminary to this meeting the defendants, Glass and Ridgway, caused to be prepared in the office of the company, deeds descriptive of each of the various tracts, signed, sealed and acknowledged by the defendant Ridgway, as president of the company, and executed with the name of the grantee left blank. These deeds were at hand and ready and by the employees of the company delivered on the ground at the platform preliminary to the time of the drawing.

The fact as to the responsibility of the defendants Ridgway and Glass in the conduct of the company is one hardly to be questioned in considering the facts in this case. The land was purchased by the defendants; the corporation was incorporated by the defendants; and those very persons who thereafter became stockholders were the

personal friends and followers and, in many cases, the employees of the defendants. It is admitted in the record, and the fact was well established, that all of the numerous employees of the company took their orders from Ridgway and Glass. Of the two defendants, the plaintiff in error, was generally charged with the responsibility of directing the affairs of the company. In the offices of the company an office was specially set apart for him, in his capacity as an officer of the company, and to his judgment was submitted the decision of every affair of serious concern to the company. Glass lived, during a greater part of the life of the Jovita Land Company, upon the property at Jovita, which is situated approximately twelve miles from Tacoma, and approximately twenty-four miles from the city of Seattle. Glass came to Seattle and to the office of the company almost daily during the time the sales were being made down to the date of the drawing afterwards held upon the property.

Oral representations which supplemented and exaggerated the suggestions in the written literature of the company were generally made through agents employed by the company. It was apparently the theory of the defendants and their operations were



conducted along that line, that they would not and could not be held responsible for the acts and representations of their numerous agents in orally exaggerating the beauties of the method by which the property was to be distributed. Whenever the occasion became urgent, it was the custom of both Glass and Ridgway to explain that the manner of the distribution of the land was a puzzle for the purchasers to decide, but on several occasions Glass supplemented this explanation by a statement to the effect that the usual way was by a drawing or lottery. (See the statement of witness McCash, p. 53, line 5, of the record.)

The method for which provision was made by the company to bring about the distribution of the property was as follows:

The notices hereinbefore referred to having been sent out to the various "lot buyers" of a locality, provision was there made for a local meeting at which a delegate would be selected who was to report at Jovita on the date of the drawing and there act as a direct representative for the purchasers of that particular locality. This arrangement was in a general way carried out prior to the

drawing. As the date of the drawing approached, the defendant Glass, the plaintiff in error, procured the services of a carpenter who was directed by Glass to build upon the ground a raised platform designed and intended for the proceedings afterwards held on the ground. This carpenter was directed as well to build two revolving boxes, and for that purpose Glass furnished the carpenter the necessary plans and specifications. (See page 52, line 15, of the record.) Glass enjoined secrecy upon the carpenter with reference to the construction of these boxes. The office employees of the concern and the field representatives as well were directed to be and appear for duty at the grounds on the date of the drawing. There also mysteriously appeared on the morning of the drawing from some source which was unexplained in the record, numbered cards running from one to twenty-seven hundred, and upon which were inscribed the numbers in that sequence, and upon other cards of a similar number appeared the description of these various pieces of property. The deeds hereinbefore referred to likewise appeared this date on the platform ready for distribution.

The stenographers and office help of the company appeared on this morning and took their places upon the platform, and on this day, following a preliminary ceremony, assisted in the work of filling in and distributing at least a portion of the deeds for the property as the numbers and descriptions were drawn from the two revolving boxes to which reference has already been made.

On the morning of the drawing the defendant Ridgway stepped upon the platform and made a statement to the effect that they were ready to deliver the deeds to the property and asked the persons present to perfect their own organization. A plan seemed to be immediately evolved which was strictly in accordance with the appliances and preparations already made. A committee was appointed and the ballots and boxes were used in accordance with the preparations already referred to. Such part of the work of distributing the deeds, not completed on that date, was afterwards finished by the distribution from the office of the company of those deeds yet remaining on hand.

For the purpose of carrying forward this plan the defendants and the company indulged gener-



ously in the use of the United States mails. So numerous were the different kinds of literature sent out by this company and these defendants, that in the nature of things it was impossible to prove that any specific piece of printing was in fact sent out at the direct instance or request of either defendant. The various employees of the company, when called upon the stand, would identify literature which had been received through the mails by various persons, as being similar to that which had been sent out by them from the office in the general course of the business of the company (p. 52, line 2). There is no question in the record as to the responsible officers under whose direction these employees performed the several duties.

The development of this scheme or plan began in December, 1908, and ran through the year 1909 down to the 4th day of July, 1910, on which date the drawing was held. It will therefore be noted that this scheme or plan was under way during a period of something like a year and a half. Many of the letters and pamphlets referred to were committed to the mail prior to March 4, 1909, and many from time to time thereafter. The defendants were

indicted under ten different counts in cause number 2168. The court will find occasional reference to cause number 2169. This latter case has nothing to do with the case now on appeal. Number 2169 covers the charge brought against the defendants for the distribution, following a similar plan, of the Jovita Heights property.

A demurrer was interposed by both defendants to the indictment and argued before Judge Cushman. This is found on page 20 of the Transcript of Record. It will be noted that the demurrer raised the question of the statute of limitations, and is generally otherwise based upon the statement that the several counts "are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same."

It was conceded by the government that counts I and V were barred by the statute. The opinion of Judge Cushman, as filed, reads "I to V" but this is corrected by the order shown at page 28 of the Transcript of Record.

The defendants were charged in the various counts under section 3894 of the Revised Statutes,

found at page 337 of volume 2, Fed. Stat. Annot., and section 213 of the Penal Code. While there is no reference to the matter in the written demurrer filed in the case, it is apparent from the opinion of the trial court that there was considered the suggestion of counsel, as now made to this appellate court, that there was an improper joinder of the two different offenses in the same indictment. Upon a second trial of the cause (Judge Neterer presiding) a verdict was rendered finding the defendant Glass guilty of counts II, III, IV and VII, and not guilty of counts VI, VIII and IX.

It was the judgment of the court that the defendant Glass should be imprisoned for a period of sixty days on each of the four counts, to be served concurrently, and to be fined the sum of \$300 on each of the four counts.

The defendant Ridgway was also fined and imprisoned, but has not appealed from the judgment imposed.

The specifications of error of the plaintiff herein are somewhat numerous, being thirty-four in number, but upon analysis raise few questions for consideration of the court.



Specifications from I to X are considered under one head.

### ARGUMENT.

The italics used herein are those of the brief writer except as otherwise noted.

It is first contended by the plaintiff in error that there is an improper joinder in this indictment of offenses charged under 3894 R. S., providing for imprisonment of not more than one year, or a fine of not more than \$500, with a charge under section 213 of the Penal Code, which provides for a penalty of imprisonment not in excess of two years or a fine not in excess of \$1,000, or both.

Counsel for plaintiff in error have set forth a substantial part of each of the sections referred to, and while the quotation is not entire in either case, it is at least sufficient in each case to show that the subsequent re-enactment was intended by Congress to be a re-enactment of section 3894. The general subject matter is the same; the phraseology is in many particulars the same, and the conduct intended to be proscribed is in all essentials the same. The pleader in the preparation of this indictment

was confronted with this not unusual situation. The law in each section contemplates the existence of a general scheme or plan. Section 3894 uses this language:

*“concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses.”*

Section 213 uses similar language in referring to:

*“Any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes, dependent in whole or in part upon lot or chance.”*

Both these sections create offenses which are somewhat, by analogy, comparable to Section 5440, the original conspiracy section of the federal statutes.

It is true that in the conspiracy statute the criminal scheme is itself the crime—in the *postal* statutes referred to, the scheme is an incidental

matter, while the sending of the letter itself is made the offense. A scheme or plan does not in itself contemplate an offense which inerges or converges upon a given moment of time. It does contemplate, however, an existing state of affairs which may continue through a more or less indefinite period of time. In the case at bar, the scheme or plan was actually in operation for a period of approximately a year and a half, while during that period of time numerous and continuous violations of law undoubtedly occurred. The Federal Congress had in some measure changed the status of 3894 R. S. by imposing a heavier penalty than before, but Congress did not necessarily intend to repeal the former criminal act, and neither did Congress intend or expect to exonerate any person who had violated its provisions. Since violations had occurred prior to the change in the law, and others had occurred since the change in the law, but since there was but one scheme or plan operating throughout, it was quite natural for the pleader to assume that these various acts of misconduct were so interwoven into each other that they should be joined in one complete indictment. It may well be questioned that, if two indictments had been procured, based



upon these two sections, would any trial court have hesitated, upon motion for the defense, to consolidate the two into one criminal case. On the other hand, what judge, having reasonable consideration for the orderly administration of criminal laws and the expense incident thereto, would have expected or required a prosecuting official to file two separate indictments and try two separate cases involving the use of substantially the same witnesses in each of the two cases.

The attention of the court is called to Section 1024 R. S., a part of the Act of February 25, 1853, found at page 337, Vol. 2, Fed. Stat. Annot. This section reads as follows:

“When there are several charges against any person for the same act or transaction, *or for two or more acts or transactions connected together*, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.”

This section may be deemed as supplanting and qualifying any rule of the common law or rules of

practice or procedure which had preceded it relative to the drafting of criminal indictments. It certainly was not intended to have the effect of imposing, either upon a defendant an unreasonable burden, or upon the government unreasonable restriction and undue expense. There have been many decisions construing this section, but unfortunately nearly all precede the enactment of the new Penal Code, which fixes, for the first time, a satisfactory definition as to the distinction between misdemeanors and felonies. Counsel, at page 41 of his brief, suggests that the government had elected to prosecute the defendant under Section 3894. There was no such election made by the government and no agreement to that effect, so far as it appears in the record, unless the introduction of evidence in support of all the counts constitutes the election referred to by counsel.

Counsel have referred to several early cases, including *United States vs. Gaston*, 28 Fed. 848, and *McElroy vs. United States*, 17 Sup. Ct. Rep. 31, reported also in 41 L. Ed. p. 355.

The latter is a case in which an indictment for assault with intent to kill one Elizabeth Miller; also

an indictment for assault with intent to kill Sherman Miller; both crimes as of date April 16, 1894, were consolidated with a criminal charge of arson of the dwelling of one Eugene Miller, the date being fixed as May 1, 1894, and a fourth indictment against part of the same defendants for the burning of the dwelling house of one Bruce Miller. These incongruous and singular charges were combined by the lower court for trial, and this action was held to be erroneous. The court, through Chief Justice Fuller, suggested that the several charges of the four indictments were not against the same persons; "*nor were they for the same act or transaction, nor for two or more acts or transactions committed together.*" The reasoning of the court further goes to the point that the statute does not authorize consolidation of indictments, "in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." There would seem to be no conflict between a decision of the Supreme Court criticizing a combination of four indictments against different parties for offenses as dissimilar as arson and assault occurring at differ-



ent times, and the action of the court in the case at bar.

Here the sending of the various letters arose out of one and the same plan, scheme and procedure. The letters were sent out to effect a common purpose; the defendants were the same; the moral turpitude of the acts committed prior to the time when the Act of March 4, 1909, went into effect was exactly the same as the moral turpitude involved in the sending of the letters after that time. There was no hardship imposed upon the defendants in the case at bar by reason of the inclusion of other defendants in the case.

The case cited by counsel for the plaintiff in error is not in point so far as it might throw any light upon the case under consideration.

The case of *United States vs. Gaston*, reported in 28 Fed. 848, is a decision by Judge Welker of the United States District Court for the Northern District of Ohio. Judge Welker there refused to permit the joinder of charges for carrying on the business of retailing liquor without posting a stamp in his place, with a charge of not having paid the special stamp, and other charges under Section 3242

R. S., which is a felony punishable by fine and imprisonment. The reasoning of the court is not given, and his decision is in conflict with cases hereinafter referred to.

Reference is made to the case of *United States vs. Howell*, 65 Fed. 402, in which the opinion was written by Judge Morrow. In the opinion of counsel for the government, this case does not sustain the position of plaintiff in error. The court is there called upon to pass upon the complaint of a defendant that the crime with which he was charged, that of having counterfeit money in his possession, was "split up into separate charges as if they were for distinct offenses." The court did not agree with the contention of counsel for the defendant. The court, in construing Section 1024, hereinbefore referred to, discussed the case of *Pointer vs. United States*, 151 U. S. 396, and there calls attention to the fact that the Supreme Court of the United States was, in the *Pointer* case, giving its authority to the procedure permitting the charging of two separate and distinct murders in the same indictment, for the reason that they were crimes of the same class. The court uses the following language at page 407:

“But the real test of the whole question, I take it, is whether the defendant is prejudiced in any substantial way. In passing upon this feature of the case, the court is invested with such discretion as enables it to do justice between the government and the accused.”

Judge Morrow cites with approval the English case of *Reg. vs. Truman*, 8 Car. & P. 727, a case in which there appeared five counts, each charging the firing of a house of a different owner. The quotation from Erskine, J., is quoted with approval:

“*As it is all one transaction*, we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defense.” (Italics ours.)

The contention of the defendant was not sustained by Judge Morrow in the case referred to.

Counsel for plaintiff in error have quite properly called the attention of the court to the fact that Section 1024, hereinbefore set forth, makes provision for the several sets of circumstances in each



of which it is permissible to join separate offenses in the same indictment. Counsel makes the same classification as that made by District Judge Hawley in the *Jones* case hereinafter referred to, and which is quoted from counsel's brief at page 42 as follows:

1st: Where there are several charges against any person for the *same* act or transaction.

2nd: Where there are "*two or more acts or transactions connected together*";

3rd: Where there are "*two or more acts or transactions of the same class of crimes or offenses.*"

4th: In each case the acts or transactions must be such as "*may be properly joined.*"

With this distinction before them, counsel cite for consideration of the court, the case of *Pointer vs. United States*, 151 U. S. 396; 38 L. Ed. 208. The *Pointer* case is distinctly and clearly, in our judgment, an illustration of the third contention above enumerated, wherein, two or more acts or transactions of the same class of crimes or offenses may be joined. In the *Pointer* case an indictment was permitted to stand in which the same defendant was charged in separate counts with two distinct

and separate murders committed on the same day. There is no suggestion in the *Pointer* case or any language used which would limit or define the meaning of the conditions 1, 2 and 4, referred to by counsel. It is contended here, not necessarily that these counts in the case at bar referred to the same class of crimes or offenses, so much as it is here contended that these two offenses did constitute—“*two or more acts or transactions connected together.*” It is easy to conceive that in a case such as the *Pointer* case the witnesses necessary to prove the facts relative to one murder might be entirely different from the set of witnesses required to prove the facts relative to the other murder. This, it is apparent, might work to the serious disadvantage of the defendant. In the case at bar, however, the evidence necessary to prove the sending of each of these letters was, almost in its entirety, the same evidence which would have been necessary to prove the sending of each of the others.

Counsel made reference to the case of *Mackin vs. U. S.*, 29 L. Ed. 909. This case seems to decide a single point, and that is that Section 5440, imposing a fine and imprisonment not in excess of two

years, is a felony. The case has no other application to the case at bar.

Supporting the position of the government, the following cases are called to the attention of the court:

The attention of the court is called to the case of *Norton vs. United States*, 205 Fed. 593-602, where it is contended that the evidence did not support the verdict of conviction on the second count. The court suggested that it is unnecessary for them to review the evidence with respect to this count, as the sentence of the court did not impose any fine, but was one of imprisonment for the same period, to run concurrently, with the sentence on the counts in indictments 587 and 590. Hence, in legal effect, the judgment that was imposed by the court was practically a single judgment and sentence.

In the case at bar, the judgment of the court imposed a sentence of imprisonment for sixty days on each count, the imprisonment to run concurrently.

*Rooney vs. United States*, 203 Fed. 929.

In construing an indictment charging two de-



fendants in one count as aiding and abetting, and in another count as principals, the court there construes Section 1024 as follows:

“It would, indeed, be difficult to conceive of two charges more closely connected. \* \* \* Both charges are based on the same transaction and on the same array of facts. Had the motion of the plaintiff in error, to require the government to elect upon which count it relied for conviction, been granted, his position before the jury would have remained unchanged.”

The opinion is by Judge Morrow.

*Brinie vs. U. S.*, 200 Fed. 727.

Judge Kohlsatt, in construing a charge with numerous counts, under the oleomargarine Act, said:

“If this indictment had been against one defendant alone, the various counts charging offenses against different sections of the oleomargarine Act committed at different times and places, each offense to be sustained by its own evidence, might properly have been joined in one indictment by virtue of Section 1024 of the Revised Statutes.”

This decision is of especial interest as occurring after the enactment of the section of the Penal Code of 1910 making imprisonment more than one

year a felony and conforms to the ruling of the courts in other oleomargarine cases to which reference is hereinafter made.

*Marshall vs. United States*, 187 Fed. 511.

In this case the combination of two indictments under Section 5480, mail fraud, was approved by the Circuit Court of Appeals of the Second Circuit.

*Emanuel vs. United States*, 196 Fed. 317.

The Circuit Court of the same circuit here approves the consolidation of a conspiracy indictment and other indictments under Section 5480, “under the very broad authority conferred by Section 1024.”

*United States vs. Norton*, 188 Fed. 258.

The District Judge of the Eastern District of Oklahoma discusses at page 265 the same section and reaches the same conclusion as to the breadth of the purpose and intent of Section 1024.

*Hartman vs. United States*, 168 Fed. 30.

The Circuit Court of Appeals of the Sixth Circuit, speaking through Judge, now Mr. Justice Lurton, in the *Hartman* case, have passed upon a situation quite similar to that presented here.

The oleomargarine Act of August 2, 1886, makes provision for numerous penalties in its various sections. Section 3, for example, provides for a mere fine; Section 13, for a fine and imprisonment up to one year; while Section 6 provides for a fine and imprisonment not in excess of two years. Each of these various sections provides its own penalty for a certain state of facts. An indictment which included eighteen counts covering all these various sections was upheld. The action of the lower court in refusing to grant a motion to elect was approved. Justice Lurton said:

*“The offenses were merely statutory misdemeanors of the same class, and the fact that various penalties were attached, by which imprisonment in a penitentiary was possible under some of the counts, did not prevent a joinder of counts under Revised Statutes 1024.”*  
(Italics ours.)

Other cases sustaining the position of the government herein are as follows:

*Morris vs. United States*, 161 Fed. 672-4.

This is a decision by the Circuit Court of Appeals for the Eighth Circuit, construing Section 1024 in an oleomargarine case, and agrees with the construction in the *Hartman* case.



*Krause vs. United States*, 147 Fed. 443-444.

*United States vs. Jones*, 69 Fed. 980.

The plaintiff in error next discusses under the head "Scienter" the use in the indictment of the expression, "a certain circular concerning a scheme dependent upon lot or chance," and suggests that it should read, "prizes dependent upon lot or chance."

The description of the scheme is set forth at length in the indictment (line 23, page 5, Tr. of Record) and all the proper emphasis is laid upon the fact that the prizes were dependent upon lot and chance.

Section 1025 R. S., Vol. 2, Fed. Stat. Annot., p. 340, reads as follows:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Counsel does not claim that the interests of his client were in any measure prejudiced by the phraseology of that part of the indictment men-

tioned by him; neither does he deny that the scheme was described with sufficient particularity.

It is conceded that in a crime of this kind it is not sufficient to use the mere language of the statute, but the pleader must, with some accuracy describe the particular fraudulent scheme intended to be furthered by the criminal act of depositing the letter. In the case at bar in that part of the indictment to which reference has been made, and which is found on page 5 of the Transcript of Record, the indictment sets forth that land would be acquired and be platted into lots and blocks of dissimilar size and value; that this dissimilarity was to be further increased by the building of houses of different values "upon twelve of said lots," and that thereafter "a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said Ridgway and Glass and their agents and employees."

This certainly describes with enough particularity to properly inform the defendants of the character of lottery scheme charged against them.

Counsel made reference to the case of *United States vs. Cruikshank*, 92 U. S. 524, 23 L. Ed. 588-593. This case is one in which an indictment was brought under a conspiracy section of the Federal Code, which includes as an element of the offense "that the act was done with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him." The Supreme Court held the indictment bad for the reason that the intent of the defendants was a part of the crime charged against the defendants and should therefore have been alleged as a part of the indictment. There is no comparison between the Cruikshank case and the case at bar. There is no phrase or expression of a similar kind used in Section 3894, as in the section under consideration by the Supreme Court. It is not even to be conceded that the criminal knowledge of the existence of the lottery scheme is a condition precedent to the existence of responsibility for the violation of Section 3894, for the reason the statute does not make this knowledge distinctly an element of the statutory crime. If, however, the usual rule of law is applied, that there must be criminal knowledge to create responsibility for violation of a criminal statute, the



indictment complies with that provision by alleging it in the manner provided by the statute.

The case of *United States vs. Kelsey*, 42 Fed. 882-886, referred to, is likewise, in our opinion, not in point. The statute there construed by Judge Maxey of the Western District of Texas includes the word "knowingly" and the pleader failed to include that in the indictment as provided. The court properly held that since the "knowledge" was made a part of the offense by statute, it should be included in the indictment.

The case of *United States vs. Cook*, 17 Wall. 174, 21 L. Ed. 538, referred to by counsel, has no apparent bearing upon the question under discussion. The Supreme Court has there construed a statute providing for embezzlement by a public officer which statute contains within its body an exception. The Supreme Court suggests that the pleading must be sufficiently definite to show that the defendant does not come within the exception noted.

The case of *United States vs. Hess*, 124 U. S. 483, 486; 31 L. Ed. 516, is likewise not in point. The Supreme Court there lays down what is conceded by counsel on both sides to be the law with

reference to charges based upon sections of the criminal code having reference to "schemes" in general—that it is not sufficient to conform merely to the language of the statute in indictments of this kind. In the case at bar, however, the grand jury in its indictment has set out and described with some particularity the scheme which is to be furthered by the letters and pamphlets referred to in the indictment. If the indictment had merely used the words of the statute with no other words of explanation, the case at bar would then fall within the spirit of the decision in the *Hess case*. Reference is again made to that part of the indictment which begins on page 5 of the Transcript of Record.

Counsel complains further that it was nowhere charged that the plaintiff in error knew that the letter deposited was "concerning a scheme," nor that he knew that it was a scheme similar to a lottery or gift enterprise, counsel apparently relying upon the thought that the word "knowingly" as used in the indictment on page 1 of the record, in line 10, modifies and qualifies the words "deposited and caused to be deposited" and has no other relation to the text of the indictment. But that is

not the view taken by courts which have held that the expression when so used will qualify and modify the allegations concerning the circular described in the indictment. Attention is called to the case of

*United States vs. Purvis*, 195 Fed. 618-619.

That case, decided by Judge Newman, is one similar to the case at bar, being a violation of Section 213 of the Federal Penal Code. The court there says:

“The contention is that the word ‘knowingly’ as there used only qualifies the verb ‘deposit’ and not the succeeding language of the indictment setting out the character of the contents of the inclosure. In many cases in which it was charged in the indictment that the defendant ‘did knowingly deposit in the post-office’ a certain letter, and then proceed to state ‘which said letter contained certain unmailable matter,’ describing it, it is held that the word ‘knowingly’ not only qualifies the verb ‘deposit’ but the whole matter described subsequently in the indictment.”

The court cites

13 *Enc. Pl. & Pr.* 395;

*United States vs. Clark*, 37 Fed. 106;

*United States vs. Fulkerson*, 74 Fed. 619;

and numerous other cases.



The plaintiff in error complains that the indictment should "specifically state that the defendant knew that the contents of the letter concerned a scheme offering prizes dependent upon lot or chance," but a similar case formerly before this court—

*Walkers vs. United States*, 152 Fed. 111, seemed to hold to the contrary.

It is difficult to be patient in discussing specifications of error 11, 12, 23 and 24, referred to in the brief of counsel for the plaintiff in error. The suggestion that these defendants are not to be charged with knowledge of the literature sent out from the office of the company had little weight with the jury, and can be given little consideration after a reading of the bill of exceptions at page 49 of the Transcript of Record. As stated at page 52, "The letters and circulars set forth in the indictment and introduced in evidence were matters which were sent out in the ordinary routine of the office." The literature was ordered and purchased by Lyons, at the instigation and suggestion of the defendant Glass. Both of the defendants in the case were responsible officers to whom all the employees looked

for instruction and advice. The office was stocked with great quantities of this literature which was used from time to time through a period of something over a year.

Counsel complains of the instructions of the court with reference to the relation of the defendants towards the drawing actually conducted on the property, stating that the physical absence of either or both of the defendants was a circumstance which would relieve them from responsibility. The instructions of the court on the subject are found beginning with line 17 on page 69 of the Transcript of Record, and seem to cover the matter referred to.

Counsel complains in specification 33 of the evidence adduced on behalf of the government relative to the value of the property distributed through this scheme or plan. This indictment was brought under a lottery section. Lottery is defined by *Bouvier's Law Dictionary* as—

“A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor.”

This definition is ascribed to Bishop in his *Statutory Crimes*, Section 952. This definition is in accordance with the generally accepted meaning of the term.

It was the contention in the case at bar, on behalf of the defendants, that they were selling real property. It was the contention on behalf of the government that they were actually indulging in a lottery under the disguise of a real estate scheme. If the defendants were actually selling lots worth in each case \$130 or more, it could quite reasonably be argued on behalf of the defense that this was a real estate enterprise and that the purchasers were responding so readily to this alluring literature because they were actuated by impulses of frugality and the desirability for a profitable investment. If, on the other hand, as contended by the government, these lots had no comparative value and were worth not \$130, but, in fact, probably \$5 or \$10 each, it would be some evidence going to show that this seductive literature was appealing not to the frugal sense, but to the gambling instinct which animates in some degree all mankind. It would seem to be the very best evidence of which the subject was



capable in establishing clearly for the jury the very impulse and motive which animated these numerous purchasers. Many of these "lot buyers" testified that they "took a chance" and the fact that ninety-five per cent of the lots distributed had no comparative value, while one tract was valued at \$10,000, is strong corroboration of the "chance," small and inconsiderable it is true, which was theirs in this peculiar enterprise.

Counsel complains of a sentence in which the defendant was ordered to be confined at "hard labor" and suggests that the statute does not authorize such punishment, and cites *In re. James S. Wilson*, 114 U. S. 417, 29 L. Ed. 89, and *Mackin vs. U. S.*, 117 U. S. 348, 29 L. Ed. 909, in support of his contention. The facts herein are that the court imposed a sentence of sixty days on each count, confinement in the King County jail, and did not attach to it a condition requiring hard labor. The commitment as entered upon the clerk's records uses the expression "hard labor," as has been the practice for many years in the records of the local court. The cases cited by counsel are not in point and afford no light to the court.

This question was presented to this court in the case of *Mitchell vs. United States*, 196 Fed. 874. The court in its opinion makes reference to the case of *In re. Mills*, 135 U. S. 263, in which case the Supreme Court seems to accept the rule that there is no apparent difference in the effect of the two sentences imposed. The court there said:

“There are offenses against the United States for which the statute in terms prescribes punishment by imprisonment at hard labor. There are others the punishment of which is imprisonment simply. But in cases of the latter class the sentence of imprisonment—if the imprisonment be for a longer period than one year (Section 5541) may be executed in a state prison or penitentiary, the rules of which prescribe hard labor.”

This court there said that the case could not be reversed but that the cause would be remanded with directions to enter the appropriate judgment.

It is not conceded that the mere notation of the clerk becomes the binding judgment of the court. In this particular district and the county to which the defendant Glass was sentenced, hard labor is not in fact imposed upon the prisoners of the county jail. If the defendant has been or will be in future injured by the commitment of the clerk, the com-

mitment can be and will be, by stipulation of counsel, corrected at any time. A new commitment will be issued at any time upon request of counsel for plaintiff in error.

There are no other matters in the brief which in our opinion require discussion.

The defendant was accorded a fair trial and the judgment of the lower court should, in our opinion, be sustained.

Respectfully submitted,

CLAY ALLEN,

*United States Attorney.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HENRY F. MARSHALL,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

In the Matter of the Application of HENRY F. MARSHALL for Writs of Habeas Corpus on Behalf of Thirty-five Hindus.

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Transcript of Record.

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Upon Appeal from the United States District Court for the Northern District of California,  
First Division.

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Filed

JAN 18 1915



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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HENRY F. MARSHALL,  
vs. Appellant,

SAMUEL W. BACKUS, as Commissioner of Immigration for the Port of San Francisco,  
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**Transcript of Record.**

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Upon Appeal from the United States District Court for the Northern District of California,  
First Division.

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INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of H. Santokh Singh.....	52
Affidavit of Kehar Singh.....	54
Affidavit of Mangal Singh.....	56
Affidavit of Neva Singh.....	57
Affidavit of Somond Singh.....	55
Arraignment .....	35
Arraignment.....	40
Arraignment.....	44
Arraignment.....	49
Assignments of Error.....	6
Certificate of Clerk to Transcript on Appeal..	78
Citation on Appeal—Copy.....	74
Citation on Appeal—Original.....	79

EXHIBITS:

Exhibit “A” to Petition for Writ of Habeas Corpus—Warrant of Deportation.....	25
Exhibit “B” to Petition for Writ of Habeas Corpus—Application for Warrant of Arrest.....	28
Exhibit “C” to Petition for Writ of Habeas Corpus—Warrant of Arrest...	29
Exhibit “D” to Petition for Writ of Habeas Corpus—Testimony Taken Be-	

	Index.	Page
EXHIBITS—Continued:		
fore Examining Inspector of Immigration.....		32
Exhibit “E” to Petition for Writ of Habeas Corpus—Affidavit of Khan Singh.....		50
Letter, October 11, 1913, Henry F. Marshall to Commissioner of Immigration.....		52
Opinion.....		1
Opinion and Order Denying Petitions for Writs of Habeas Corpus.....		1
Order Allowing Appeal.....		13
Order Extending Time to September 20, 1914, to File Record, etc., in Appellate Court....		81
Order to Show Cause.....		59
Petition and Notice of Appeal.....		4
Petition for a Writ of Habeas Corpus.....		14
Praeceptum.....		77
Praeceptum for Transcript on Appeal.....		75
Return of Service of Writ.....		59
Return on Service of Writ.....		14
Return to Order to Show Cause.....		60
TESTIMONY:		
KAHN SINGH.....		33
KEHER SINGH.....		37
MANGAL SINGH.....		41
NEVA SINGH.....		45



**Opinion and Order Denying Petitions for Writs of  
Habeas Corpus.**

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,500.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on behalf of Kaiser Singh, Isser  
Singh, Shumonda Singh, Naran Singh, Go Pi,  
Amanat Khan and Rehmat Khan.

No. 15,502.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on Behalf of Attar Singh.

No. 15,503.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on Behalf of Khan Singh, Keher  
Singh, Mangal Singh and Neva Singh.

No. 15,524.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on Behalf of Bran Singh.

No. 15,528.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on Behalf of Nika Singh, Ottam  
Singh, Portapa, Harnan Singh, Joala Singh,

Argen Singh, Sunda Singh, Mala Singh, Har-dut Singh, Bir Singh, Sarwan Singh and Dhin Mohammad.

No. 15,529.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on Behalf of Sucha Singh, Niaz Ma Khan, Gulam Din and Dhian Singh. [1\*]

No. 15,530.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on Behalf of Radha Singh, Gurzechen Singh, Gori Shankar, Variam Singh and Kehir Singh.

HENRY F. MARSHALL, Attorney for Petitioners.

JOHN W. PRESTON, U. S. Atty., and WALTER E. HETTMAN, Asst. U. S. Atty., Attorneys for Respondent.

These cases involve the right of the individuals named to land at the port of San Francisco, having already landed at Manila, and coming thence here.

In the case of Rhagat Singh et als., 209 Fed. 700, this Court decided that the Immigration officers on the mainland might exclude therefrom aliens theretofore admitted to the Philippine Islands, upon proof satisfactory to them that the aliens so excluded are persons likely to become a public charge. Counsel for the present petitioners urges very earnestly and very ably that this is not a case of exclusion but of

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\*Page-number appearing at foot of page of original certified Record.

expulsion. Whatever it be called, the real question still remains: "Does admission to the Philippines *ipso facto* entitle an alien to admission to the mainland?" It was stated in the case of Rhagat Singh *supra*: There "may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions and standards of living are so diverse that one going to the Philippines, who would not there be likely to become a public charge, might well be likely to become such if he proceeded thence to the mainland. A more rigid test may, therefore, well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines." [2]

The supervision over the admission of aliens to the mainland has been entrusted to the Commissioner General of Immigration, while the supervision of the admission of aliens to the Philippines is under the control of the Secretary of War. It is not a fair statement of the situation to say that the proceedings of the Immigration Department here sought to be reviewed, is an attempt on the part of the Immigration officers to review the action of the Secretary of War in admitting these aliens at the Port of Manila. Had the aliens been content to remain in the Philippines, to which place alone the Secretary of War had power to admit them, no question of their right to do so could have been moved by the Immigration authorities. But when they left the Philippines for the mainland they left the only place to which they had been admitted, and the only place to which those



admitting them had any authority to admit them, and when they reached the mainland they were naturally confronted by those whose duty it is to see that no alien shall be admitted thereto who is likely to become a public charge. I am satisfied, therefore, that the action of the authorities at Manila is not conclusive upon the Immigration officers on the mainland, and while the law is, in its present form, very uncertain and unsatisfactory, I am of the opinion that whether we call it exclusion or expulsion, the Immigration officers may prevent the entry to the mainland of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines; if they so have the power to exclude, as the aliens appear to have had a fair hearing, the fact that this was done under a Warrant of Arrest is immaterial.

The petition for a writ of habeas corpus must be denied, and it is so ordered.

March 10th, 1914.

M. T. DOOLING,  
Judge. [3]

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [4]

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(Style of Court, Titles and Numbers of Causes.)

**Petition and Notice of Appeal.**

Now comes the petitioner above named, and the persons above named for and on whose behalf said

petitions were filed, appellants herein, through their attorney, feeling themselves aggrieved by and at the Order and Judgment of the above-entitled Court made and entered herein on the 10th day of March, A. D. 1914, denying their petitions for Writs of Habeas Corpus, and hereby appeal from said Order and Judgment made as aforesaid, to the United States Circuit Court of Appeals for the Ninth Circuit, because of certain errors made to their prejudice, all of which will appear more in detail from the Assignment of Errors, which is filed herewith; and appellants further represent to this Court that the facts and circumstances in each of the above-entitled causes are identical and that the pleadings therein vary only as to the names of the persons interested, the times of their arrival and of various proceedings, and the dates of various warrants and documents therein, all of which has been frequently stipulated in open Court by the respective attorneys of record; and appellants further represent that the encumbering of the record by needless repetition may be avoided by selecting the record in one case as typical of them all, and that thereby appellants will be relieved of burdensome, useless and unnecessary expense in the preparation and printing of said record;

WHEREFORE, appellants pray that an appeal may be granted in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause No. 15,503, duly authenticated, may be sent and transmitted to the

said United States Circuit Court of Appeals for the Ninth Circuit, as typical of the record in all of the above-entitled causes.

Dated March 18, 1914.

HENRY F. MARSHALL,

Attorney for Petitioner and Appellants. [5]

Service and receipt of a copy of the within Petition and Notice is admitted this 18th day of March, 1914.

WALTER E. HETTMAN,

Asst. United States Attorney.

[Endorsed]: Filed Mar. 18, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [6]

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(Style of Court, Titles and Numbers of Causes.)

**Assignments of Error.**

Now comes Henry F. Marshall, the petitioner in each of the causes above named, and files his assignments of error upon which he will rely on his appeal in the above-entitled matters, this day taken from the Order and Judgment made and entered by this Court on the 10th day of March, 1914, denying the petitions of said petitioner for Writs of Habeas Corpus in each of the above-named causes, and petitioner alleges that the District Court erred in holding contrary to the contention of petitioner and in failing and refusing to hold with the contention of petitioner in each and every the particulars hereinafter set forth, as follows:

I.

The Court erred in refusing to take jurisdiction of each of the petitions for a writ of habeas corpus filed



by petitioner for and on behalf of the several Hindoos therein named.

II.

The Court erred in dismissing each of said petitions.

III.

The Court erred in not granting said petitions and each of them and in not causing to issue the writs therein prayed.

IV.

The Court erred in denying each of said petitions and in refusing the writs therein prayed.

V.

The Court erred in failing and refusing to distinguish between (1) the exclusion of an alien applying for original admission to the United States and (2) the expulsion from the United States of an alien previously admitted to land. [7]

VI.

The Court erred in refusing to hold that the causes (1) for the exclusion of an alien applicant and (2) for the expulsion of an alien previously admitted are in law separate and distinct and not interchangeable.

VII.

The Court erred in refusing to hold that, in expulsion cases, the burden of proof is upon the Department.

VIII.

The Court erred in refusing to hold that, for all immigration purposes, the Philippine Islands are part of the United States.

## IX.

The Court erred in refusing to hold that an alien, duly admitted to land by the duly constituted authorities under the Immigration law at ports in the Philippines, is free to pass from one part of the United States (Manila) to another (San Francisco) without further examination or re-examination as to his qualifications for original entry.

## X.

The Court erred in predicating its decision upon the assumption that "There may be reasons for rejecting an alien at Continental ports which would not exist if he were applying to enter the Philippines," there being no provision of law thereto, nor any evidence to that effect before the Court.

## XI.

The Court erred in holding that "membership in the excluded classes at time of entry" renders an alien regularly admitted to lands liable to expulsion.  
[8]

## XII.

The Court erred in refusing to hold that causes for exclusion, in order to bring a specified alien within "membership in the excluded classes," must be present existing causes at the time of entry.

## XIII.

The Court erred in refusing to hold that "the opinion that an alien is likely to become a public charge," in order to bring that alien within "membership in the excluded classes," must be a present existing opinion at time of original entry; and particularly in refusing to hold that a subsequent opinion to that

effect does not bring the alien within such membership.

#### XIV.

The Court erred in holding that a present opinion that an alien at some time past was liable to become a public charge constitutes a ground for the expulsion of such alien.

#### XV.

The Court erred in refusing to hold that the administration of the Immigration laws of the United States, in so far as they apply to aliens seeking admission at Philippine ports, is entrusted by law to the Secretary of War and the Insular Government, to the exclusion of the Secretary of Labor and the Commissioner-General of Immigration.

#### XVI.

The Court erred in refusing to hold that the determination of the question as to whether or not a certain alien, applying for admission to the United States at a Philippine port, is a person likely to become a public charge is entrusted to the Secretary of War and the Insular Government to the exclusion of the Secretary of Labor and the Commissioner-General of Immigration; that the attempted determination of such question by the Secretary of Labor and Commissioner-General is without jurisdiction [9] and in excess of the jurisdiction conferred upon them by law; and that the attempt, by said Secretary of Labor and Commissioner-General, to reverse or review the decision rendered upon such question, by the Secretary of War and Insular Government, is without jurisdiction and in excess of the



jurisdiction conferred upon them.

#### XVII.

The Court erred in holding that the Secretary of Labor and Commissioner-General, acting under authority of the Immigration law, may promulgate and enforce a rule, by the terms of which aliens, already duly admitted to the United States, are denied the right to freely pass from one to another part thereof, except upon submitting themselves to a re-examination of their qualifications for original admission.

#### XVIII.

The Court erred in refusing to hold that the following constituted "unfairness in the hearing," to wit, placing in the record quantities of interviews, affidavits and newspaper clippings prejudicial to Hindoos as a race of people, the same not being shown to apply to the persons sought to be deported.

#### XIX.

The Court erred in refusing to hold that the following constituted "unfairness in the hearing," to wit, placing in the record evidence as to the disease "hookworm," which evidence the aliens were not permitted to inspect, nor answer, the same being done without the knowledge of the said aliens or their attorney.

#### XX.

The Court erred in holding that, in expulsion cases, the finding by the Court that the hearing had been fair precluded the Court from an examination into the merits. [10]

## XXI.

The Court erred in refusing to go into the merits of the cases, to examine the quantity, quality and effect of the evidence, and to determine whether or not the Department had established its contentions by a preponderance of the evidence in accordance with the burden of proof resting upon it so to do.

## XXII.

The Court erred in refusing to consider and determine whether or not the warrants of deportation, in so far as the same are based upon "dangerous contagious disease," are sustained by any evidence, or by a preponderance of evidence, or whether the evidence before the Department is conclusively against the finding in that regard.

## XXIII.

The Court erred in refusing to hold that the warrants of deportation are without authority of law, and are without and in excess of the jurisdiction of the Secretary of Labor to issue such warrants, and that each and all of them are for these reasons null and void.

## XXIV.

The Court erred in refusing to hold that, in law, "membership in the excluded classes at time of entry" is not of itself a ground for the expulsion of an alien.

## XXV.

The Court erred in refusing to hold that, under the law applicable to an admitted alien, "liability to become a public charge at time of entry" is not sufficient to bring such alien within membership in the

excluded classes, and liable to expulsion as such.

XXVI.

The Court erred in refusing to hold that each and every [11] said warrants of deportation are null and void, in that they fail to charge a cause for expulsion under the Immigration law or any law of the United States.

XXVII.

The Court erred in refusing to hold that said Hindoos, having been admitted to the United States, are not applicants for admission and therefore not subject to the exclusion laws.

XXVIII.

The Court erred in holding that said Hindoos might lawfully be expelled from the United States, in that there was no evidence before the Department or the Court to show that they come within any of the classes of alien residents of the United States for whom the statute provides expulsion.

Respectfully submitted,

HENRY F. MARSHALL,

Attorney for Petitioner and Appellants.

Service and receipt of a copy of the within assignment of errors is admitted as of this 18th day of March, 1914.

WALTER E. HETTMAN,

Asst. United States Attorney.

[Endorsed]: Filed Mar. 18, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]



(Style of Court, Titles and Numbers of Causes.)

**Order Allowing Appeal.**

The petitioner above named, and the persons above named for and upon whose behalf said petitions were filed, having, through their attorney, presented to this Court this day their Petition on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from and upon the order and judgment made and entered by this Court on the 10th day of March, 1914, denying their petition for Writs of Habeas Corpus, and having presented to the Court at the same time their Assignment of Errors, and having moved the Court by their counsel for an order allowing said appeal; and counsel for said appellants and the United States Attorney having heretofore in open court stipulated that the facts and circumstances in each of said causes are identical, and that the pleadings vary only as to names of persons interested, times of arrival and of proceedings, and dates of warrants and documents, and appellants having prayed that said appeal may be heard upon the record in one case as typical of all, and good cause therefor to me appearing,—

IT IS HEREBY ORDERED that said appeal be and the same is hereby allowed; and, further, that a certified copy of the record, proceedings and papers in the above-entitled Cause No. 15,503 be prepared and transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit within the time prescribed by law, said

Cause No. 15,503 being hereby designated as typical of all of the above-named causes;

AND IT IS FURTHER ORDERED that during the pendency of this appeal all proceedings against the above-named persons be stayed.

Done in open court this 18 day of March, 1914.

M. T. DOOLING,  
District Judge. [13]

**Return on Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed order allowing appeal, on Samuel W. Backus, by handing to and leaving a true and attested copy thereof with Samuel W. Backus, Commissioner of Immigration of the Port of San Francisco, at Angel Island, Cal., personally, at Angel Island, Cal., in said District on the 20th day of March, A. D. 1914.

J. B. HOLOHAN,  
U. S. Marshal.  
By J. W. Grover,  
Office Deputy.

[Endorsed]: Filed Mar. 18, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

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(Style of Court, Title of Cause No. 15,503.)

**Petition for a Writ of Habeas Corpus.**

To the Honorable M. T. DOOLING, Judge of the  
Above-entitled Court:

The Petition of Henry F. Marshall respectfully  
shows:

## I.

That your petitioner is a resident of the City and County of San Francisco, State of California, and that he is an attorney at law and attorney of record for Khan Singh, Keher Singh, Mangal Singh and Neva Singh, above named, for and on behalf of each of whom this petition is made.

## II.

That this petition is made for and on behalf of these four men thus grouped together, for the reason that they are thus grouped by the Department of Labor of the United States.

## III.

That for the convenience of the Court the persons for and on whose behalf this petition is filed will be hereinafter referred to as Four Hindus.

That the said Four Hindus, and each of them, are *bona fide* domiciled residents, inhabitants and denizens of the United States of America; that they were born in India and are subjects of Great Britain; that they came to the United States by way of Manila, Philippine Islands, and were admitted after due inspection by the Immigration Officers at the Port of Manila; and that thereupon they became and ever since have been and now are lawfully in the United States of America; [15]

That upon their arrival in Manila they paid the head-tax required by the provisions of Immigration Act, February 20th, 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (34 Stat. 263), and March 4th, 1913, and the Immigration Rules of November 15th, 1911.



## IV.

That after residing for various period in Manila, and in other portions of the Philippine Islands, said Four Hindus signified to the Immigration Officers and to the Insular Collector of Customs at Manila their intention to go to the continent and were furnished with certificates (Form 546 P. I.) as evidence of their regular entry at said Insular Port.

## V.

That thereafter, in order to move from one part of the territory and jurisdiction of the United States of America to another, said Four Hindus sailed from the Port of Manila as passengers on the SS. "Nippon Maru" to take up their residence and continue their domicile and remain denizens of the United States in another part of the territory and jurisdiction of the United States of America, and, on the 22d day of September, 1913, arrived at the Port of San Francisco.

## VI.

That the said Four Hindus are unlawfully imprisoned, detained, confined and restrained of their liberty by Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, at the Immigration Station at Angel Island, California, or at some other place in the Northern District of California, and are about to be deported to India from the United States and from the State of California and from their domicile, and to be deprived of their residence and the privileges and immunities of denizens of the United States of America, against [16] their will and without their consent.

## VII.

That the said Four Hindus, and each of them, are so imprisoned, detained, confined and restrained of their liberty by the said Commissioner of Immigration, as aforesaid, and are about to be deported as aforesaid, and the said Commissioner claims the right to so imprison, detain, confine and restrain, and to so deport the said Four Hindus under and by virtue of a certain warrant of deportation, issued by the Secretary of Labor of the United States, whereby it is ordered that the said Four Hindus be deported to India, a copy of which warrant is hereto attached and made a part hereof and is marked Exhibit "A."

## VIII.

The *the* proceedings had and taken preliminary to and leading up to the issuance of the said warrant of deportation, were and are as follows:

That subsequent to the said entry into the United States of said Four Hindus, and immediately upon their arrival at the Port of San Francisco as aforesaid, and prior to the issuance of said warrant of deportation, to wit, on the 22d day of September, 1913, the said Four Hindus were taken into custody by the said Commissioner;

That thereafter, to wit, on the 23d day of September, 1913, an application was made to the Secretary of Labor by said Commissioner of Immigration for a warrant for the arrest of the said Four Hindus, a copy of which application is attached hereto and made a part hereof, and marked Exhibit "B"; in which said application it was charged that the said Four Hindus were unlawfully in the United States

for the following reasons: [17]

“That these aliens are laborers; that there is no demand in this section for that class of labor; further that there is a decided prejudice among the people of this locality against this class of labor.”

That thereafter, to wit, on the 24th day of September, 1913, a warrant was issued by the then Acting Secretary of Labor for the arrest of the said Four Hindus, and others, a copy of which warrant is hereto attached and made a part hereof, and marked Exhibit “C”; in which warrant it is charged that said Four Hindus are unlawfully in the United States for the reason “that the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.”

That on certain days subsequent to the issuance of said warrant, to wit, on the 24th and 25th days of September, 1913, the said Four Hindus were, while detained and under arrest at said Immigration Station at Angel Island, examined by Examining Inspector R. E. Peabody, through an interpreter, which said examination was reduced to a written record by an official stenographer, a copy of which said record is attached hereto and made a part hereof, and marked Exhibit “D”; that at said examination the above-named subjects of examination, and each of them, answered to the best of their ability all of the questions which were then propounded to them.

#### IX.

That the said Four Hindus, and each of them, were denied a fair hearing in good faith, such as is



guaranteed by law, and in this behalf petitioner alleges:

(1) That the record of the above-mentioned [18] examination discloses upon its face that said Four Hindus were not informed of the charges nor allegations made against them or of the issuance of the warrant for their arrest until after the conclusion of their examinations.

(2) That at the above-mentioned examinations the said Four Hindus were the only persons examined; that no testimony or evidence of any kind or character other than that of the said Four Hindus was taken or offered; that there has been no other, further or subsequent hearing of which said Four Hindus, or any of them, or their attorney, had any notice, knowledge or information;

(3) That, at the expiration and conclusion of said examinations, the said Four Hindus were informed by the said Examining Inspector that "You are further informed that this hearing is given you for the purpose of giving you the opportunity to show cause, if any you have, why you should not be deported," and that thereafter said Four Hindus, and each of them, offered and filed with the said Samuel W. Backus, Commissioner of Immigration, affidavits executed in due form, showing and tending to show, that said Four Hindus, and each of them, are not and were not liable to become public charges, which affidavits are made a part hereof and marked Exhibit "E," being in the form of copies of said originals;

(4) That the said Samuel W. Backus, Commis-

sioner as aforesaid, detailed an Immigration Inspector to canvass the people of the State of California for evidence to support the charges made against the said Four Hindus; that no evidence was obtained, but that there was placed in the records certain expressions of passion and prejudice culled from persons in various parts of the State of California in the form of affidavits, [19] interviews and letters, made, given and written by persons unknown to your petitioner, or to any one of the Four Hindus aforesaid, in *ex parte* proceedings, and without said Four Hindus, or any of them, or their attorney, having an opportunity to cross-examine the persons who made the affidavits, gave the interviews or wrote the letters; that there was also placed within the record about 1,000 newspaper columns of newspaper clippings of matter, views and reports of a character adverse to and prejudicial to the Hindus as a race; that copies of said affidavits, letters, interviews and newspaper clippings are omitted herefrom, the reason for this omission being that it is impossible for your petitioner to secure copies thereof, and for the further reason that said Four Hindoos have not sufficient funds to defray the expense of copying that great volume of matter;

(5) That thereafter, according to petitioner's information and belief, a certain so-called record was compiled in said cases by and under the direction of the said Commissioner, a complete copy of which so-called record is contained, so far as your petitioner is informed and believes, in the said Exhibits herein (except that in said exhibits there is not included

the *ex parte* statements, letters, interviews, affidavits and newspaper clippings hereinbefore referred to); that upon the so-called record your petitioner prepared and filed with the said Commissioner of Immigration a brief on behalf of said Four Hindus; (that a copy of said brief is not included herein for the reason that your petitioner has no remaining copy thereof, nor is any copy thereof available to him); that to said so-called record and brief there was added a document described as "Views of the Immigration Officer in Charge"; that no copy of [20] said document is included herein for the reason that neither your petitioner, nor any of said Four Hindus, has ever seen or been permitted to see said document, but, on the contrary, it is withheld by the Immigration Authorities on the claim that said document is a confidential communication;

(6) That said so-called record, together with the brief of petitioner and the document hereinbefore last referred to, was transmitted to the Secretary of Labor, the method of transmission, being, as your petitioner is informed and believes, by the United States Mail.

## X.

That the said Secretary of Labor and the said Commissioner of Immigration have refused and denied the said Four Hindus, and each of them, a fair hearing in good faith in this, to wit:

(1) That the said warrant of deportation was so issued, as aforesaid, by the said Secretary of Labor upon and by reason of a finding made by the said Secretary that the said Four Hindus were members



of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States; and in this regard petitioner refers particularly to Exhibit "A" herein;

(2) That the said finding was so made and the said warrant of deportation was so issued by the said Secretary without any competent evidence having been submitted to him and without any competent evidence having been introduced by the said Commissioner, and without any evidence, competent or otherwise, against the said Four Hindus having been introduced for the inspection of Four Hindus, or any of them, or of their said attorney; [21]

(3) That the said Commissioner caused to be inserted in the so-called record a large number of *ex parte* affidavits, interviews, letters, and newspaper clippings, they and each of them having no reference whatever to the said Four Hindus, or to any of them, but the same being only writings of passion and prejudice directed against the Hindu Race.

## XI.

That the said Secretary of Labor issued said warrant of deportation and so directed the deportation of the said Four Hindus by and through errors and mistakes of law in this, to wit:

(1) That the warrant is issued upon the charge that said Four Hindus have been "found in the United States in violation of law, in this, that the said aliens are members of the excluded classes in that at the time of their entry into the United States they were persons likely to become public charges"; and that said alleged grounds for the issuance of said

warrant, are not grounds for the deportation of any domiciled alien, under the Immigration Law or under any law of statute of the United States;

(2) That the issuance of said warrant of deportation by the Secretary, upon the grounds set forth therein, is in violation of law and is in excess of the power conferred upon the said Secretary by law, to issue said warrant in this: that said warrant is not based upon any grounds upon which the said Secretary of Labor is authorized by law to issue such warrants.

## XII.

That the said Four Hindus, and each of them, have [22] exhausted all of their rights and remedies before the Department of Labor; that the said warrant of deportation is final as to the judgment of said Department of Labor, and that there is no appeal therefrom provided by law; that unless a writ of habeas corpus issue out of this Court directed to the said Samuel W. Backus, Commissioner of Immigration as aforesaid, to whom the said warrant of deportation was directed, and in whose custody the bodies of the said Four Hindus are, the said Four Hindus, and each of them, will forthwith be deported from the United States to India.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, commanding said Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, to have and to produce the bodies of the said Four Hindus before this Honorable Court, in its courtroom at the City and County of San Francisco, in the Northern

District of California, at the opening of court on a day certain, in order that the alleged cause of imprisonment and restraint of the said Four Hindus, and the illegality or legality thereof, may be inquired into, and in order that, in the case that the said imprisonment and restraint are unlawful and illegal, the said Four Hindus, and each of them, may be discharged from all custody and restraint; and that the said Four Hindus, and each of them, be admitted to just and reasonable bail pending all proceedings herein.

Dated this 10th day of December, A. D. 1913.

HENRY F. MARSHALL,

Petitioner.

HENRY F. MARSHALL,

Attorney for Four Hindus. [23]

State of California,

City and County of San Francisco,—ss.

Henry F. Marshall, being first duly sworn according to law, deposes and says:

That he is the petitioner named in the above and foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to those things which are therein stated upon his information and belief, and as to those things he believes it to be true.

HENRY F. MARSHALL,

(Duly Verified.) [24]



[Exhibit "A" to Petition for Writ of Habeas Corpus  
—Warrant for Deportation.]

UNITED STATES OF AMERICA.

DEPARTMENT OF ~~COMMERCE AND~~ LABOR.  
WASHINGTON.

No. 53,627/39-A—51—58—58-A

To Samuel W. Backus, Commissioner of Immigration,  
Angel Island Station, San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector R. E. Peabody, held at Angel Island Station, San Francisco, Cal., I have become satisfied that the aliens KAHN SINGH and KEHER SINGH, who landed at the port of San Francisco., per SS "Nippon Maru," on  
have

the 22d day of September, 1913, ~~has~~ been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said aliens are members of the excluded classes in that they were afflicted with uncinariasis, a dangerous contagious disease, at the time of their entry into the United States, and that they were at the time of such entry persons likely to become public charges, and may be deported in accordance therewith:

I, LOUIS F. POST, Acting Secretary of ~~Commerce and~~ Labor, by virtue of the power and authority vested in me by the laws of the United

States, do hereby command you to return the said aliens to India, the country whence they came, at the expense of the appropriation, "Expenses of Regulating Immigration, 1014." You are directed to purchase transportation for the aliens from San Francisco, Cal., to their home in India, at the lowest scheduled [25] steerage rate available, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 22d day of November, 1913.

(Sgd.) LOUIS F. POST,

Acting Secretary of ~~Commerce~~ and Labor.

MC. (COPY—HS—12/1/13.) [26]

WARRANT—DEPORTATION OF ALIEN.

UNITED STATES OF AMERICA.

DEPARTMENT OF ~~COMMERCE~~ AND LABOR.

WASHINGTON.

No. 53,627/39-A—51—58—58-A

To Samuel W. Backus, Commissioner of Immigration, Angel Island Station, San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector R. E. Peabody, held at Angel Island Station, San Francisco, Cal., I have become satisfied that the aliens MAN-GAL SINGH and NEVA SINGH, who landed at the port of San Francisco, Cal., per SS. "Nippon Maru,"  
have

on the 22d day of September, 1913, ~~has~~ been found in the United States in violation of the Act of Congress

approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States, and may be deported in accordance therewith:

I, LOUIS F. POST, Acting Secretary of ~~Commerce and~~ Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said aliens to India, the country whence they came, at the expense of the appropriation "Expenses of Regulating Immigration, 1914." You are directed to purchase transportation for the aliens from San Francisco, Cal., to their home in India, at the lowest scheduled steerage rate available, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.  
[27]

Witness my hand and seal this 22d day of November, 1913.

(Sgd.) LOUIS F. POST,

Acting Secretary of ~~Commerce and~~ Labor.

MC. (COPY—HS—12/1/13.) [28]



**[Exhibit "B" to Petition for Writ of Habeas Corpus  
—Application for Warrant of Arrest.]**

Application for warrant of arrest under sections 20  
and 21 of the Act of February 20, 1907.

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

12924/4-2, 4-4 to 4-18,

4-20 to 23, inclusive.

(Place) San Francisco, California.

September 23, 1913.

Confirming telegram of even date:

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of Kahn Singh, Nika Singh, Ottam Singh, Portapa, Inder Singh, Harnam Singh, Sondara Singh, Karam Sing, Keher Singh, Joala Singh, Sunda Singh, Inder Singh, Mala Singh, Argen Singh, Hardut Singh, Bir Singh, Sarwan Singh, Mangal Singh, Neva Singh, Siroop Singh, Dhin Mohammed the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

That these aliens are laborers; that there is no

demand in this section for that class of labor; further that there is a decided prejudice among the people of this locality against this class of labor.

(2) The present location and occupation of above-named alien are as follows: Detained at Angel Island Station.

Pursuant to Rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port [29] through which said alien entered the United States.

(Signature) SAMUEL W. BACKUS,  
(Official title) Commissioner.

REP/EL.

Copy. [30].

**[Exhibit "C"—to Petition for Writ of Habeas  
Corpus—Warrant of Arrest.]**

UNITED STATES OF AMERICA.

DEPARTMENT OF COMMERCE AND LABOR.  
WASHINGTON.

No. 53,627/58.

To Samuel W. Backus, Commissioner of Immigration, Angel Island Station, San Francisco, California, or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien KAHN SINGH, NIKA SINGH, OTTAM SINGH, PORTAPA, INDER SINGH, HARNAM SINGH, SONDARA SINGH,

KARAM SINGH, KEHER SINGH, JOALA SINGH, SUNDA SINGH, INDER SINGH, MALA SINGH, ARGEN SINGH, HARDUT SINGH, and BIR SINGH who landed at the port of San Francisco, Cal., per SS "Nippon Maru," on the 22d day of September, 1913, have been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.

I, LOUIS F. POST, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said aliens and grant them a hearing to enable them to show cause why they should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending further proceedings, the aliens may be released from custody upon their own recognizance, provided you are [31] satisfied they will appear when wanted; otherwise only under bond in the sum of \$500 each.

For so doing, this shall be your sufficient warrant.



Witness my hand and seal this 24th day of September, 1913.

(Sgd.) LOUIS F. POST,  
Acting Secretary of Commerce and Labor. [32]

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA.  
DEPARTMENT OF COMMERCE AND LABOR.  
WASHINGTON.

No. 53,627/58.

To Samuel W. Backus, Comissioner of Immigration,  
Angel Island Station, San Francisco, California, or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the aliens SARWAN SINGH, MANGAL SINGH, NEVA SINGH, SIROOP SINGH, and DHIN MOHAMMED, who landed at the port of San Francisco, Cal., per SS. "Nippon Maru," on the 22d day of September, 1913, have been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States,

I, LOUIS F. POST, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said aliens and grant them a hearing to enable them

to show cause why they should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending further proceedings, the aliens may be released from custody upon their own recognizance, provided you are [33] satisfied they will appear when wanted; otherwise only under bond in the sum of \$500 each.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 24th day of September, 1913.

(Sgd.) LOUIS F. POST,

Acting Secretary of Commerce and Labor. [34]

**[Exhibit "D" to Petition for Writ of Habeas Corpus  
—Testimony Taken Before Examining In-  
spector of Immigration.]**

DEPARTMENT OF LABOR.  
IMMIGRATION DIVISION.

Angel Island Station,

San Francisco, Cal., September 24, 1913.

Hearing in Case of KAHN SINGH, 12924/4-2,  
Nippon Maru, 9/22/13, Under Arrest Under  
Authority of Departmental Warrant of Sept.  
24th.

Examining Inspector—R. E. PEABODY.

Interpreter—D. S. DADY BURJOR.

Stenographer—ELISE LONG.

[**Testimony of Kahn Singh.**]

Alien duly sworn:

Q. Do you understand the interpreter?

A. Yes.

Q. Are you willing to proceed with this examination, being satisfied that this interpreter will faithfully interpret the questions propounded and the answers thereto?     A. Yes.

Q. What is your name?

A. Kahn Singh; 38 years old; widower; I have two children.

Q. Are you still a subject of Great Britain?

A. Yes.

Q. Did you arrive at this port on the SS. "Nippon Maru," Sept. 22, 1913?     A. Yes.

Q. When did you leave your native land?

A. Seven months ago I left my country.

Q. Where did you go?     A. I came to Shanghai.

Q. What were you doing in Shanghai?

A. I was peddling cloth in Shanghai.

Q. Why didn't you stay there?

A. Some of my countrymen told me that Manila was a better place and called me there, so I went over there.

Q. When did you go to Manila?

A. I stayed in Manila about one month and ten days. [35]

(Alien presents certificate Form 546, P. I., issued at the Port of Manila, July 24, 1913, indicating that the alien landed at that Port SS. "China," July 17, 1913.)



(Testimony of Kahn Singh.)

Q. What was your average income per month in Shanghai?

A. Some months 15 pesos, some months 20 (\$7.50 to \$10), deducting expenses, Shanghai currency.

Q. What did you do in Manila?

A. I was peddling cloth in Manila.

Q. What was your average income per month in Manila?

A. Deducting expenses, 30 pesos a month (\$15).

Q. Why didn't you stay in Manila?

A. All the people said, "Let us go to San Francisco, a better place," and I said, "Come along; we will go."

Q. How long after you landed in Manila did you make up your mind to come to the United States?

A. Seven or eight days after I arrived there.

Q. What do you intend to do in the United States?

A. I want to do farming work business in this country.

Q. Then you will go to work on a farm for wages?

A. Yes, if I get good employment I will do it, but I will not be a coolie.

Q. How much money did you have when you came to Philippine Islands?      A. About 31 pounds.

Q. How much have you now?

A. (Exhibits \$63, gold.) I have no more with me.

Q. Have you any more anywhere?

A. I have my money in Shanghai.

Q. How much have you in Shanghai?

A. \$300, Shanghai currency.

(Testimony of Kahn Singh.)

Q. Have you any documentary evidence that you have any money on deposit in Shanghai?

A. No, I have no receipt of any letter or documentary evidence. [36]

Q. Are you a land owner in your native country?

A. I have my own land because my parents are dead.

Q. How much land have you?

A. About 500 rupees income from the land every year.

Q. Have you any documentary evidence to offer here to show that you are a land owner?

A. No, I have got none.

Q. At the time you landed in Manila were you examined for the existence of any dangerous, contagious disease?

A. Yes, they examined and passed me.

Q. At the time you embarked for the mainland were you examined?

A. Yes, I have my certificate with me.

(Presents certificate dated Aug. 9, 1913, signed by one W. M. Lemmon, to the effect that he has been examined and found free of hookworm.)

**[Arraignment.]**

September 25, 1913.

You are now informed that you are taken into custody in pursuance of instructions contained in Departmental telegraphic warrant dated September 24, 1913, in which it is alleged that you were a person likely to become a public charge at the time of your entry the Philippine Islands. This hearing

(Testimony of Kahn Singh.)

is given you for the purpose of affording you an opportunity to show cause, if any you have, as to why you should not be deported. You have a right to be represented by counsel, and both yourself and your counsel have a right to inspect this warrant and all evidence in connection with this case. Do you wish to be represented by counsel?

A. Yes, we all wish to be represented by counsel.

Q. Do you know who your attorney will be?

A. Mr. Marshall. [37]

Alien duly sworn:

Q. Were all the statements you made in your examination yesterday true? A. Yes.

Q. Do you wish to make any changes in your statements? A. No.

Q. Have you any reason to offer as to why you should not be deported?

A. If they did not want me to be admitted here why did they make me lose my money by giving me a passport.

I certify as to the correctness of the foregoing transcript.

ELISE LONG,  
Stenographer. [38]



DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Angel Island Station,

San Francisco, Cal., September 24, 1913.

Hearing in Case of KEHER SINGH, 12924/4-10,  
"Nippon Maru," 9/22/13, Under Arrest Under  
Authority of Departmental Warrant of Sept.  
24th.

Examining Inspector—R. E. PEABODY.

Interpreter—D. S. DADY BURJOR.

Stenographer—ELISE LONG.

**[Testimony of Keher Singh.]**

Alien duly sworn:

Q. What is your name?      A. Keher Singh.

Q. Do you understand the interpreter?

A. Yes.

Q. Are you willing to proceed with this examination, being satisfied that this interpreter will faithfully interpret the questions propounded and the answers thereto?      A. Yes.

Q. How old are you?      A. 21 years old; single.

Q. Are you still a subject of Great Britain?

A. Yes.

Q. When did you leave your native land?

A. I left my country 2 1/2 years ago.

Q. Did you arrive at this port September 22, 1913, on the "Nippon Maru"?      A. Yes.

Q. Why did you go from your native land?

A. I was a farmer in my country; I went to Shanghai and was a watchman for one year in Shanghai; received \$20 wages per month, Shanghai currency.

(Testimony of Keher Singh.)

Q. Where did you go from Shanghai?

A. I went to Chung King in China as a watchman in the East India Company of New York.

Q. What wages did you receive there?

A. \$25 wages, Shanghai currency (\$12.50, gold).

[39]

Q. Why didn't you stay there?

A. I returned from Chung King back to Shanghai because the weather did not agree with me.

Q. Did you work in Shanghai again?

A. I could not get any work, so I went to Manila.

Q. When did you go to Manila?

A. About 7 months ago.

(Alien presents certificate Form 546, No. 28, dated port of Manila, April 21, 1913, which indicates that alien arrived at that port on the SS. "Siberia," February 6, 1913.)

Q. What have you been doing in Manila?

A. First two months I was peddling cloths, and then I was employed again as a watchman.

Q. What wages did you receive?

A. 35 pesos a month (17.50 a month).

Q. Why didn't you stay in Manila?

A. I lost my employment and I did not see any prospects of doing business, so I left.

Q. Then you left Manila simply because you could not secure other employment?      A. Yes.

Q. How much money did you have when you went to Manila?

A. 200 pesos, Manila currency (\$100).

Q. How much money have you now?

(Testimony of Keher Singh.)

A. \$50 (Exhibits same).

Q. Is that all you have?

A. Yes; that is all I have here.

Q. Have you any more anywhere?

A. I can get it from Manila from my cousins.

Q. Have your cousins any money that belongs to you?     A. Not my own.

Q. Have you ever been in the United States before?     A. No.

Q. What do you intend to do here?

A. I will do business or do farming.

Q. In other words, you will do whatever work is offered you?

A. First, if I can get somebody to employ me for farming I will do [40] it, and then I will get me own.

Q. Have you any relatives in the United States?

A. Yes, I have a cousin; his name is Dal Singh; I have no address with me of that man.

Q. Do you own any land in your native land, or is it a family estate?

A. It is held in the family, but partly belongs to me; my father being alive I cannot say it is my own.

Q. Have you any money of your own in your native land?

A. I have not got my money; I cannot get it from my father.

Q. At the time of your entrance to the Philippine Islands were you examined for the existence of any dangerous contagious disease?

A. He examined me and passed me.



(Testimony of Keher Singh.)

Q. At the time you embarked for the United States were you examined for the existence of any dangerous contagious disease?

A. Yes, they examined me.

Examiner's Note: The medical examiner of aliens at this station has certified this alien to be suffering from uncinariasis, a dangerous, contagious disease.

September 25, 1913.

### **Arraignment.**

You are now informed that you are taken into custody in pursuance of instruction contained in Departmental telegraphic warrant dated September 24, 1913, in which it is alleged that you were a person likely to become a public charge at the time of your entry to the Philippine Islands. This hearing is given you for the purpose of affording you an opportunity to show cause, if any you [41] have, as to why you should not be deported. You have a right to be represented by counsel, and both yourself and your counsel have a right to inspect this warrant and all evidence in connection with this case. Do you wish to be represented by counsel?

A. Yes, we all wish to be represented by counsel.

Q. Do you know who your attorney will be?

A. Mr. Marshall.

Alien duly sworn:

Q. Were the statements you made in your examination yesterday the truth?

A. Everything I said yesterday is the truth; I have nothing to change.

(Testimony of Keher Singh.)

Q. Have you any reason to offer why you should not be deported?

A. What I want to say is that they gave me the passport in Manila, and now I lose all my money by coming here; if they had not given me the passport I would not have come here.

I certify as to the correctness of the foregoing transcript.

ELISE LONG,  
Stenographer. [42]

DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Angel Island Station,

San Francisco, Cal., September 24, 1913.

Hearing in case of MANGAL SINGH, 12924/4-20,

"Nippon Maru," 9/22/13, Under Arrest Under

Authority of Department Warrant of Sept. 24th.

Examining Inspector—R. E. PEABODY.

Interpreter—D. S. DADY BURJOR.

Stenographer—ELISE LONG.

[**Testimony of Mangal Singh.**]

Alien duly sworn:

Q. What is your name?      A. Mangal Singh.

Q. Do you understand the interpreter?

A. Yes.

Q. Are you willing to proceed with this examination, being satisfied that this interpreter will faithfully interpret the questions propounded and the answers thereto?      A. Yes.

Q. How old are you?      A. 22; single.

(Testimony of Mangal Singh.)

Q. Are you a British subject?      A. Yes.

Q. Did you arrive at this port on the SS. "Nippon Maru" from Manila September 22, 1913?      A. Yes.

Q. What is your occupation?

A. Farmer in my country; my land belongs to my family.

Q. When did you leave your native land?

A. 2 1/2 years go.

Q. Where did you go?

A. First came to Malay Peninsula and from there went to Hong Kong and from there went to Manila.

Q. How long did you stay in Hong Kong?

A. Stayed for one month in Hong Kong; had no work in the Malay Peninsula or Hong Kong; went straight to Manila. I was employed as a watchman in Manila.

Q. How long were you in Manila?

A. 16 months. [43]

(Alien presents certificate 546, No. 344, dated Manila, August 11, 1913, indicating that he landed in Manila from the SS. "Zafiro," May 13, 1912.

Q. Have you been employed steadily as a watchman in Manila up to the time you started for this country?

A. About 7 or 8 months I was employed as a watchman, and the rest of the time I was peddling cloth.

Q. How much money did you make in Manila as a watchman?

A. 50 pesos per month (\$25, gold).

Q. What was your average income as a peddler?

A. Nothing certain about it; sometimes I made



(Testimony of Mangal Singh.)

after expenses, 15 or 20 pesos; sometimes I made absolutely nothing; sometimes I made 5 or 10.

Q. Why didn't you stay in Manila?

A. I heard that this country was a very fine country and very good chances for people like me, and I gave up my business there and came here.

Q. Is it not a fact that your business was not paying you in Manila?     A. Yes.

Q. Then as a matter of fact you left Manila because you were not making sufficient money for your needs?     A. Yes.

Q. How much money did you have when you came to Manila?     A. \$50, gold.

Q. How much have you got now?

A. \$60, gold (exhibits same).

Q. Is this all the money you have?     A. Yes.

Q. What do you intend to do in the United States?

A. I want to do business.

Q. What kind of business?

A. Whatever I find preferable I will do business in.

Q. In other words you expect to follow the occupation of a peddler here?     [44]

A. Yes.

Q. If you do not succeed in finding a suitable business opening what will you do then?

A. I have got my brother called Sumun Singh living in Seattle.

Q. Whereabouts in Seattle?

A. He has been a long time in Seattle and is well

(Testimony of Mangal Singh.)

known; I don't know where he is, but I can find out from my temple.

Q. What is he doing in Seattle?

A. I don't know.

Q. Is it not a fact that you will go to work for wages in the event that you do not succeed as a peddler?

A. If I get any employment I will do it.

Q. Were you examined for the existence of any dangerous or contagious disease at the time you landed at Manila?      A. Yes.

Q. Were you examined at the time you left Manila to come to the mainland of the United States?

A. Yes.

Examiner's Note.—Medical examiner of aliens at this port has certified this alien to be suffering from uncinariasis, a dangerous, contagious disease.

September 25, 1913.

### **Arraignment.**

You are now informed that you are taken in custody in pursuance of instructions contained in Departmental telegraphic warrant dated September, 24, 1913, in which it is alleged that you were a person likely to become a public charge at the time of your entry to the Philippine Islands. This hearing is given you for the purpose of affording you an opportunity to show cause, if any you have, as to why you should not be deported. You have a right to be represented by counsel, and both yourself and your [45] counsel have a right to inspect this warrant

(Testimony of Mangal Singh.)

and all evidence in connection with this case, do you wish to be represented by counsel?

A. Yes, we all wish to be represented by counsel.

Q. Do you know who your attorney will be?

A. Mr. Marshall.

Alien duly sworn:

Q. Were the statements you made in your previous examination the truth?      A. Yes, no lie.

Q. Do you wish to change your statement in any manner?      A. No, I have nothing more to say.

Q. Have you any reason to offer why you should not be deported?      A. I will speak to my lawyer.

I certify as to the correctness of the foregoing transcript.

ELISE LONG,  
Stenographer. [46]

DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Angel Island Station,

San Francisco, Cal., September 24, 1913.

Hearing in Case of NEVA SINGH, 12924/4-21,  
"Nippon Maru," 9/22/13, Under Arrest Under  
Authority of Departmental Warrant of Sept.  
24th.

Examining Inspector—R. E. PEABODY.

Interpreter—D. S. DADY BURJOR.

Stenographer—ELISE LONG.

[Testimony of Neva Singh.]

Alien duly sworn:

Q. Do you understand the interpreter?



(Testimony of Neva Singh.)

A. Yes.

Q. Are you willing to proceed with this examination, being satisfied that this interpreter will faithfully interpret the questions propounded and the answers thereto?      A. Yes.

Q. What is your name?

A. Neva Singh; 28 years old; not married.

Q. Are you still a subject of Great Britain?

A. Yes.

Q. Did you arrive at this port on the SS Nippon Maru, September 22, 1913?      A. Yes.

Q. When did you leave your country?

A. Three years ago.

Q. Where did you go?

A. Singapore and was in business there peddling cloth.

Q. How long did you stay in Singapore?

A. Two years and then I went to Manila; I was also in business in Manila peddling cloth.

Q. Did you do any other work in Manila but peddle?      A. No, none.

Q. When did you go to Manila?

A. I stayed in Manila for a year. (Alien presents certificate Form 546, P. I., No. 343, dated August 11, 1913, at Manila, showing that the alien arrived at that port per SS. "C. de Eizaguirre," Sept. 15, 1912. [47])

Q. Why didn't you stay in Manila?

A. I did my business there for one year and having a higher aspiration, wanting to get some more money I came here.

(Testimony of Neva Singh.)

Q. What was your average income a month in Manila?

A. Average taking out all expenses I could earn 20, 22 or 25 pesos, Manila currency, a month (\$10 to 12.50).

Q. Then the real reason that you left Manila to come to this country was because you could not make sufficient funds to take care of your needs?

A. Yes, that is a fact.

Q. What do you intend to do in the United States?

A. The same kind of business I did there.

Q. What do you intend to do in the event you do not succeed in getting business?

A. If I cannot get along I will have to go back.

Q. Is it not a fact that you will take whatever work will be offered you here?

A. No, I will not take any employment or work; I can get money from this firm where I deposited money; it is a very big firm; I have 900 pesos deposited with Dhunamall Chellaram, Esquire, Indian merchant, at Zamboanga, P. I., P. O. Box 1191.

Q. Have you any documentary evidence that you have any money with this man?

A. No, I have no receipt, but I can send him a telegram and get my money now if you want.

Q. How much money have you? (Exhibits \$50.)

Q. Are you a land owner in your country?

A. Yes, I have my land but my father is alive, which means it belongs to the family.

Q. Have you any money in your own country?

(Testimony of Neva Singh.)

A. All the money is with my father; I can get it.  
[48]

Q. You have no money that belongs to you individually in your own country?

A. All my money is supposed to belong to my father until he dies.

Q. How do you expect to do business on \$50?

A. I have got my brother in California; he is named Jai Singh.

Q. Whereabouts in California?

A. I don't know his address; I will go to the temple and try to find out.

Q. What does your brother do here?

A. He does the business.

Q. What kind of business?

A. He is selling; he is peddling.

Q. Do I understand you then to say if you do not find your brother and do not succeed in doing business that you will send for money and go back to your country?

A. Yes, I will get my money from this firm where I deposited it and get out.

Q. Then under no circumstances would you take a position in this country or accept employment?

A. No, I will do nothing.

Q. At the time of your entry to the Philippine Islands were you examined for the existence of any dangerous, contagious disease?

A. Yes, I was examined and passed.

Q. At the time that you embarked for the United States were you examined?



(Testimony of Neva Singh.)

A. Yes, I brought my certificate too.

Examiner's Note: Medical examiner of aliens at this port has certified this alien to be suffering from uncinariasis, a dangerous, contagious disease.

September 25, 1913.

### **Arraignment.**

You are now informed that you are taken into custody in pursuance of instructions contained in Departmental telegraphic warrant dated September 24, 1913, in which it is alleged that you were [49] a person likely to become a public charge at the time of your entry to the Philippine Islands. This hearing is given you for the purpose of affording you an opportunity to show cause, if any you have, as to why you should not be deported. You have a right to be represented by counsel, and both yourself and your counsel have a right to inspect this warrant and all evidence in connection with this case. Do you wish to be represented by counsel?

A. Yes, we all wish to be represented by counsel.

Q. Do you know who your attorney will be?

A. Mr. Marshall.

Alien duly sworn.

Q. Were all the statements you made in your examination yesterday true? A. Yes.

Q. Do you wish to change your statement in any way? A. No.

Q. Have you any reason to offer as to why you should not be deported?

A. I don't want to change anything in what I said yesterday. I want to know why I was not admitted;

I am a merchant—businessman; I stayed in Manila for one year; if I stayed there why can't I stay here?

I certify as to the correctness of the foregoing transcript.

ELISE LONG,  
Stenographer. [50]

**[Exhibit "E" to Petition for Writ of Habeas Corpus  
—Affidavit of Khan Singh.]**

(Entitled, Before Department of Labor, in re  
KHAN SINGH.)

State of California,

City and County of San Francisco,—ss.

KHAN SINGH, being first duly sworn according to law, deposes and says:

I am the alien above named, detained upon Department warrant for deportation as above recited.

I am 38 years of age and up to seven months ago have always been engaged in farming my own land in India. I own an interest in 150 ghumars of land situated in one tract and having upon it some seven residence houses. This land is worth 400 Rupees per ghumar and the houses are valuable in addition. This land is situated in the village of Panjeward in the District of Amritsar. From my interest in this land I receive an income of 500 Rupees per year. in my absence this property is managed by my two brothers who reside thereon.

I have another brother, Jagat Singh, who is Police Officer #13 in Shanghai. He holds 300 Dollars in Shanghai money with him in trust for me, which he will send to me if I write for it.

I left my home village about seven months ago

and went to Shanghai. From there I went to Manila and was in Manila one month and 12 days, when I embarked for San Francisco.

In Shanghai I was examined by the Harvard Medical School of China as to my health, and was given a certificate dated Shanghai, July 7th, 1913, signed by Walter S. Hiltner, which stated that I had no ova of "Uncinarisis." [51]

In Manila I was examined by Dr. Lemmen who issued a certificate dated Manila, P. I., August 9th, 1913, certifying that I have been examined by him and that he did not find any evidence of "Hookworm" or "Amoeba."

If I have this disease, and I am informed that the Immigration Doctor says that I have this trouble, I have acquired it since I left Shanghai and arrived in Manila.

I am going now to my friend, H. Santokh Singh, at Orwood Station, Woodward Postoffice, California, who has put up the money with the bonding company for my release.

This money man comes from the village near the village where I lived. An aunt of mine was married into his village and that is how we come to be acquainted.

KHAN SINGH.

(Duly verified.) [52]



(Entitled, Before Department of Labor, in re  
KHAN SINGH.)

**Affidavit of H. Santokh Singh.**

State of California,  
City and County of San Francisco,—ss.

H. Santokh Singh, being first duly sworn according to law, deposes and says:

I know the alien above named and I know that he owns land as stated in his affidavit which I have heard read.

I have been in the United States for four years. I hold under lease 200 acres of land at Orwood Station which land is planted in potatoes. There are from 15 to 20 Hindu men working for me on this land, and if Khan Singh shall be released and wants work with me I will give him permanent employment, at \$2.25 a day and found.

I have \$700 in cash now and am just selling my potato crop and in a few weeks will have a great deal more money, but I have put up \$500 already for the bond of this man.

H. SANTOKH SINGH.

(Duly verified.) [53]

[Letter, October 11, 1913, Henry F. Marshall to  
Commissioner of Immigration.]

October 11, 1913.

Commissioner of Immigration,  
Angel Island, Cal.

Sir: Attached to the original of this letter please find three certificates relative to the physical condition of Khan Singh, ex SS. "Nippon Maru," Sep-

tember 22, 1913 (4-2), held under Department Warrant for deportation dated September 24, 1913, No. 12,924, and certified for "Hookworm," reading as follows:

Stockton, Cal., Oct. 3, 1913.

(To whom it may concern.)

This is to certify that Khan Singh is under my care suffering from intestinal trouble.

Signed—C. L. SIX, MD.

Dameron Hospital, Laboratory of Dr. Linwood Dozier.

Date 10/7/13 Hindu Man.

Material to be examined. Faeces.

Report. Taenia Saginata ova (beef worm).

Stool clay colored—meat and vegetable remnants—very poor handling of food—partial biliary obstruction.

No hookworm seen.

Diagnosis. Tapeworm ova, Bile duct obstruction (partial).

LINWOOD DOZIER, M. D.

Stockton, Cal., Oct. 8, 1913.

(To whom it may concern.)

This is to certify that I have treated Kahn Singh for tape-worm successfully. The same has been removed.

Signed—C. L. SIX, M. D.

When this alien was released on bond I insisted, as is my custom in every case where disease is certified, that the alien take [54] treatment for its cure. In view of the foregoing, I request that he be

granted a re-examination by the Surgeon at Angel Island.

Very respectfully,

HENRY F. MARSHALL,

Attorney for Alien. [55]

OFFICE COPY.

Hook.

(Entitled, Before Department of Labor, in re  
KEHAR SINGH.)

**Affidavit of Kehar Singh.**

State of California,

City and County of San Francisco,—ss.

Kehar Singh, being first duly sworn according to law, deposes and says:

I am the alien above named, held under warrant for deportation as above recited.

I have been for one year in Shanghai, and for eight months in Chun Kien, China, and for several months in Manila. I speak some English.

I have a brother in Manila who holds in trust \$300 in Gold for me. His name is Chanam Singh, and he works for the W. S. Stevenson Co., Limited, at #227 Concepcion St., Manila. This money he will send to me if I write him.

I have another brother in California. His name is Dal Singh, who works in Exeter, Tulare County, on the Merryman Ranch. To him I will go when I am landed here.

I present herewith a letter of recommendation on the letter head of Francisco Reyes, #364 Sulucan, Sampalor, Manila, dated August 2d, 1913, and signed



Francisco Reyes. This letter states that I have been employed in the service of the College and Seminary of Santa Mesa, Mandaleyan, for three months and proved to be faithful and a very good night watch.

I also present the customary certificates by the doctors, Dr. Lemmen at Manila and the Pacific Mail Certificate stating that I am free from "Hookworm" and "Amoeba" and also am free from "Trachoma."

KEHAR SINGH.

(Duly verified.) [56]

OFFICE COPY.

Hook.

(Entitled, Before Department of Labor, in re  
MANGAL SINGH.)

**Affidavit of Somond Singh.**

State of California,

City and County of San Francisco,—ss.

SOMOND SINGH, being first duly sworn according to law, deposes and says:

I am the own blood brother of Mangal Singh, the alien above named, held under Department Warrant for deportation.

I have lived in the United States for nearly six years in all. I was here for a term of five years and then went back to India where I remained for two years and afterwards returned to the United States about six months ago.

When I left the United States to go to India I left behind me loans to one of my countrymen in the sum of \$900. This money upon my return I recovered from him and I have it now in my possession, to-

gether with other moneys which I have saved since my return.

I have placed \$500 with the bonding company to secure the release of my brother upon bond pending the determination of this matter. I have also \$500 in money with me, and I will afford to my brother such assistance as may be necessary, either starting him out in some little business, or if necessary in aiding him to be treated by a doctor for the disease which the Immigration Doctor says he has.

SOMOND SINGH.

(Duly verified.) [57]

OFFICE COPY.

(Entitled, Before Department of Labor, in re  
MANGAL SINGH.)

**Affidavit of Mangal Singh.**

State of California,

City and County of San Francisco,—ss.

MANGAL SINGH, being first duly sworn according to law, deposes and says:

I am informed that in my examination before the Inspector I was made to say that I left Manila to come to San Francisco because I could not make enough money for my needs. This statement is not correct. I made money in the Philippines during the period that I was there and saved sufficient to pay my expenses to San Francisco and had more money when I reached San Francisco than when I first reached Manila. What I did or intended to say to the Inspector was that at some periods I did not make much above my expenses and at other periods I made more than my expenses.

I was examined for a dangerous, contagious disease by the doctor when I first went to Manila in 1912; I was also examined by the surgeon for that disease when I left Manila to come to the United States. I present herewith a Certificate from the Christian Hospital, Philippines Mission, Manila, dated August 16th, 1913, and signed by Dr. W. S. Lemmen, which certifies that I was at that date free from evidences of "Hookworm" or "Amoeba" and also free from "Trachoma."

I am informed that the Immigration Doctor says that I have "Hookworm," but if I have it I have acquired it since I was admitted to the United States, and I shall at once go to a doctor and have him treat me for that disease. [58]

My brother is here with me now. He has come down from the State of Oregon to await the outcome of this hearing. I shall be with him in Hope, California, until such time as the decision of the Department is announced.

MANGAL SINGH

(Duly verified.) [59]

OFFICE COPY.

Hook.

(Entitled, Before Department of Labor, in Re  
NEVA SINGH.)

**Affidavit of Neva Singh.**

State of California,  
City and County of San Francisco.—ss.

Neva Singh, being first duly sworn according to law, deposes and says:



I am the alien above named held under Department Warrant as above recited.

I have heard from my brother, Jai Singh, since I have been at Angel Island. He lives at Orwood, California, and has sent a friend to San Francisco to deposit the money necessary for my release on bond pending the decision in this case. He did not come himself because this friend speaks much better English and is entrusted with the management of the business of many of my countrymen in that neighborhood.

I am informed that the Immigration Doctor says that I have "Hookworm." I was examined for that disease when I reached Manila in December, 1912, and was passed by the Immigration Doctor there. I was also examined and hold a certificate which I exhibited to my attorney as he dictates affidavit signed by Dr. Lemmen at Manila. This is on the Pacific Mail Steamship Company's usual health form and certifies that at the time it was issued, namely upon 15th, 1913, I was free from that disease. If I have that trouble I undoubtedly acquired it while in the United States in Manila. If permitted to land, and also while I am out on bond, I shall go immediately to an American doctor and be treated for this trouble until I shall be cured.

My brother, Jai Singh, has been in the United States [60] for nearly 12 years. He is a prosperous resident of the State of California for several years past.

NEVA SINGH.

(Duly Verified.)

[Endorsed]: Filed Dec. 10, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [61]

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(Style of Court, Title of Cause No. 15,503.)

**Order to Show Cause.**

Upon consideration of the petition herein it is ordered that the Respondent, the Commissioner of Immigration at the Port of San Francisco, show cause in this Court, at the Courtroom thereof, in the Postoffice Building, in the City and County of San Francisco, at 10 o'clock A. M. on Monday, the 15th day of December, 1913, why the Writ of Habeas Corpus should not issue as prayed for by petitioner.

Let a copy of this order be served forthwith upon said respondent and upon the United States Attorney for this District, and meanwhile let deportation be stayed.

Done in open Court this 10 day of December, A. D. 1913.

M. T. DOOLING,

Judge of the United States District Court.

**Return of Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Order to Show Cause on the therein named Commissioner of Immigration of the Port of San Francisco, by handing to and leaving an attested copy thereof with Samuel W. Backus, said Commissioner of Immigration, personally, at Angel Island

in said District, on the 11th [62] day of December, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By Elmo Warner,  
Office Deputy.

[Endorsed]: Filed Dec. 10, 1913. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [63]

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(Style of Court, Title of Cause No. 15,503.)

**Return to Order to Show Cause.**

Now comes Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, by Charles F. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court on the petition of Henry F. Marshall for a writ of Habeas Corpus, respectfully shows that your respondent holds Khan Singh, Keher Singh, Mangal Singh and Neva Singh, all of whom are aliens under orders of deportation signed and issued by the Honorable Acting Secretary of Labor, dated November 2, 1912, after a due and proper consideration of the record in the case of each of said aliens by the said Acting Secretary of Labor.

I.

Your respondent admits each and every allegation in paragraph I of said petition.

II.

And your respondent admits each and every allegation in paragraph II of said petition.



## III.

And your respondent admits each and every allegation in paragraph III of said petition; but denies that said four aliens names in the petition are bona fide domiciled residents, inhabitants and denizens of the United States and denies further that said aliens were admitted after due inspection by the Immigration officials at the port of Manila.

## IV.

And your respondent admits each and every allegation in paragraph IV of said petition. [64]

## V.

And your respondent admits each and every allegation in paragraph V of said petition..

## VI.

And your respondent admits each and every allegation in paragraph VI, except that your respondent denies that said alien was unlawfully imprisoned, detained and confined of his liberty, and further deny that said alien was deprived of any of the privileges or immunities of denizens of the United States, but that he was subjected to the same rules, regulations and laws of the Immigration Department to which any alien under like conditions and circumstances might be subjected.

## VII.

And your respondent admits each and every allegation in paragraph VII of said petition.

## VIII.

And your respondent admits each and every allegation in paragraph VIII of said petition, except that your respondent denies the allegation on page

4 of said paragraph VIII that the alien answered to the best of his ability all the questions which were propounded to him, and alleges that the answers were not entirely bona fide and true in every instance.

### IX.

And your respondent denies that the said four aliens were denied a fair hearing in good faith such as is guaranteed by law.

1. Your respondent denies the allegation in subdivision 1 of paragraph IX that the record of the above mentioned examinations discloses on its face that the said four aliens were not informed of the charges against him until after the conclusion [65] of the examination and further denying, your respondent alleges that said four aliens were informed of the charges against them and their rights and privileges at the end of the preliminary examinations and that said procedure was entirely in conformance with Rule 22, subdivision 4b, of the Immigration Laws.

2. And your respondent denies the allegations in subdivision 2 of paragraph IX, and alleges that the immigrant inspector made their decision from the testimony produced and from their experience with aliens coming into this country under like circumstances and conditions, and further alleges that subsequent or further hearing on behalf of the said aliens might have been had upon a reasonable request to the immigration authorities.

3. And your respondent admits the allegations in subdivision 3 of paragraph IX and alleges further



that the examinations of said four aliens were entirely in accordance with Rule 22, subdivision 4b of the Immigration Laws.

4. Anr your respondent denies the allegation in subdivision 4 of paragraph IX that said Samuel W. Backus, Commissioner of Immigration, detailed an immigrant inspector to canvass the people of the State of California for evidence to support the charges made against said four aliens, and alleges further that certain affidavits and newspaper clippings were made a part of the record of the cases in the matter of the petition on behalf of Baghat Singh and twenty-one other aliens, but that said affidavits and newspaper clippings were not an actual part of the record of the said four aliens in this case, but were merely included by reference, and the attorney representing said four aliens was allowed to peruse and examine said documents. [66]

5. And your respondent denies the allegations in subdivision 5 of paragraph IX and alleges that the said affidavits and newspaper clippings are a part of the record in the case of Baghat Singh and twenty-one aliens whose case is now on appeal to the Circuit Court of Appeals, Ninth Circuit.

6. And your respondent admits the allegation in subdivision 6 of paragraph IX, except that respondent denies that said record was a "so-called" record, but that it is an actual, complete and true record, and your respondent alleges further that the document described as "Views of the Immigration Officer in Charge" is withheld because it is a confidential communication or letter of transmission



which accompanied the record when the said record was sent to the Secretary of Labor.

X.

And your respondent denies that the Secretary of Labor and said Commissioner of Immigration have refused and denied the said four aliens a fair hearing in good faith.

1. And your respondent admits the allegations in subdivision 1 of paragraph X of said petition.

2. And your respondent denies the allegations in subdivision 2 of paragraph X of said petition.

3. And your respondent denies the allegations in subdivision 3 of paragraph X of said petition, and alleges further that said ex parte affidavits, interviews, letters and newspaper clippings were never inserted in the record of said four aliens, but were merely referred to to show conditions of Labor in this country and the prejudice against the employment of aliens in the condition of the said four aliens. And your respondent alleges further that there was competent evidence in the cases of the said four aliens, as shown by the discussion and findings of the [67] Secretary of Labor upon his ordering the warrant of deportation.

The Acting Commissioner-General of Immigration reviews the testimony and evidence in the cases of the said four aliens with comments and recommendations, which were forwarded to the Secretary of Labor for his decision. The comments and recommendations are as follows:

KAHN SINGH testifies that he is 38 years old; a subject of Great Britain; widower, with two child-

ren; left India 7 months ago; went thence to Shanghai where he was a peddler of cloth; thence to Manila where he stayed about 40 days (presents certificate showing he was landed at Manila July 17, 1913); earned \$7.50 to \$10 a month clear in Shanghai; peddled cloth in Manila and earned \$15 per month clear, but remained there only a short time; wishes to "do farming work business" in this country, but "I will not be a coolie"; had about \$155 when he entered Philippines, and has \$63 now; has no more money with him but has \$150 in Shanghai; has no receipt, letter or other documentary evidence to support last statement; has land in India from which his income is 500 rupees per year (a rupee is 32¢) but has no documentary evidence to support this claim.

This alien is afflicted with uncinariasis (hookworm), which is a dangerous contagious disease.

AN AFFIDAVIT subsequently presented by this alien is to the effect that he owns a considerable estate in India which is being managed by his two brothers and which produces him 500 rupees annually; that he is going to a friend, H. Santakh Singh, Orwood Station, Cal., that he was examined for hookworm in China and also in the Philippine Islands, but was found free from that disease, but no certificate or other documentary evidence in support [68] of this assertion is furnished. This alleged friend submits an affidavit in which he claims to have a leasehold of 200 acres planted in potatoes and offers the alien employment at \$2.25 a day and found"; that affiant has \$700 in cash and will have



more when his potato crop is sold. Affiant also substantiates alien's claim regarding ownership of land.

**COMMENT:** The Bureau is inclined seriously to doubt the claim of Kahn Singh regarding the ownership of property. The definite offer of employment by a Hindu where alien would work with other Hindus is a material piece of evidence favorable to him; but is not sufficient to overcome the unfavorable features of the case. Hookworm is a debilitating disease which is very enervating in addition to being classified under the law and regulation as "dangerous contagious." A very large per cent (estimated at from 60% to 80%) of the inhabitants of India are afflicted with hookworm (Report of the Rockefeller Sanitary Commission on Hookworm Infection in Foreign Countries, pages 9 and 59). As the disease is usually contracted by coming into contact with damp soil that is impregnated with the parasite (Id., see particularly pages 14 and 60), as this man was a farmer in India, making him particularly liable to contract the disease there (Id., p. 60), has been absent therefrom for only a short period of time, and has been engaged in pursuits in which he would not be as apt to contract the disease as in farming, no other conclusion seems reasonable than that he was suffering with hookworm at the time of his admission at Manila, at which port no examinations for said disease were then being conducted (as has been ascertained by inquiry of the United States Public Health Bureau).

**RECOMMENDATION:** That warrant of deportation issue on [69] ground alleged in the warrant



of arrest and on the additional ground that the alien was a member of the excluded classes at the time of entry in that he was then afflicted with a dangerous contagious disease.

KEHER SINGH testifies that he is a British subject; 21 years old; single, left India 21½ years ago; was a farmer in India; went to Shanghai and became a watchman at \$10 per month; then to Chung King, China, as watchman at \$12.50; the climate not agreeing with him he returned to Shanghai and not being able to obtain work there, went to Manila (presents certificate showing landing in Manila February 6, 1913); peddled cloth for two months in Philippine Islands, and then became a watchman at \$17.50 per month; lost his job and not being able to secure another left Manila; had \$100 when landed at Manila, now has \$50; can borrow more money from cousins in Manila; desires to do farming work here; has a cousin here but does not know his address; his family owns land in India; has no money of his own in India and could not get any from his father.

This man is certified for hookworm.

AFFIDAVIT subscribed by Keher is to the effect that he has a brother in Manila who has \$300 belonging to him which will be sent if alien writes for it; has another brother in California to whom he will go if landed; holds a letter of recommendation from one Reyes, of Manila, showing that he was employed for a college there for three months as night watchman and was faithful.

COMMENT: It will be noted that the claim of the ownership of \$300 made in the affidavit is not borne

out by the alien's oral testimony. The affidavit is not believed. Clearly the [70] general evidence regarding aliens of this kind and the economic and labor conditions are not overcome by the evidence that relates particularly to this case. Moreover, the man is suffering with hookworm and, for the same reasons given in discussing the case of Kahn Singh, *supra*, it is believed the disease existed when he landed at Manila.

RECOMMENDATION: That warrant of deportation issue on the ground stated in the warrant of arrest and on the additional ground that he was afflicted with a dangerous contagious disease at the time of entry.

MANGAL SINGH testifies that he is a British subject; 22 years old; single; was a farmer in India which he left 21½ years ago, going to Malay Peninsula, thence to Hongkong, and thence to Manila; stayed one month in Hongkong; had no work in either Malay Peninsula or Hongkong; was employed as a watchman in Manila for 7 or 8 months and then in peddling cloth (presents certificate showing landing at Manila, May 13, 1912); received \$25 per month as a watchman, and as a peddler made from nothing to \$10 per month; left Manila because he was not doing well there; had \$50 when landed at Manila, and now has \$60, which is all the money he has; expects to be a peddler here; has a brother somewhere in Seattle, but does not know his exact address or what he is doing; will do any kind of work he can get.

This alien is certified for hookworm.



AFFIDAVIT subsequently submitted by Mangal is to the effect that he did not intend to state in his oral testimony that he left Manila because he could not get along there; that if he had hookworm he must have acquired it subsequent to landing at Manila as he holds a certificate from the doctor of the Christian [71] Hospital at Manila, dated August 16th, to the effect that he was then free from evidence of hookworm, etc.

Another AFFIDAVIT by one Somond, who claims to be the blood brother of Mangal, is to the effect that he was in the United States for 5 years, returned to India, remained there 2 years, and came back here 6 months ago; has \$1,000, \$500 of which he put up as security for his brother; and will afford his brother such assistance as may be necessary.

COMMENT: It is possible but not probable on the facts and circumstances that this alien contracted hookworm after landing in Manila, the certificate does not show and he has not testified that he was subjected to the course of treatment that is necessary to demonstrate the presence in the intestinal tract of hookworm. Aside, however, from this phase of the case, it is not thought that the particular evidence is sufficient to overcome the general; in other words, it is believed that this alien was at the time of his landing in the Philippines likely to become a public charge if he proceeded to the mainland.

RECOMMENDATION: That warrant of deportation issue on the ground stated in the warrant of arrest.

NEVA SINGH testifies that he is a British sub-



ject; 28 years old; single; left India 3 years ago; was in Singapore 2 years engaged in peddling cloth; then went to Manila where he was also a peddler for one year (presents certificate showing landing at Manila September 15, 1912); made from \$10 to \$12.50 per month in Manila; left there because his income was not sufficient to support him; intends to do peddling here and will do any laboring work here; has \$450 deposited with an Indian merchant at Zambounga, but has no documentary evidence to support this; has \$50; has no [72] money in his native country as everything he has is supposed to belong to his father until the latter dies; his family owns land in India; has a brother in California, but does not know his address; brother is a peddler; if not able to locate brother and go into business will leave the mainland.

This alien is certified for bookworm.

AFFIDAVIT subsequently submitted by Neva is to the effect that he has heard from his brother who lives at Orwood and has sent a friend to San Francisco to deposit enough money to obtain his release on bond; that he has a certificate from the steamship doctor to the effect that he was free from hookworm when he left Manila; that his brother has been in the United States for nearly 12 years and is prosperous.

COMMENT: On this record the particular evidence regarding Neva is not regarded as sufficient to overcome the general evidence hereinbefore described.

RECOMMENDATION: That warrant issue for the deportation of the alien on the ground stated in

the warrant of arrest.

Acting Commissioner-General F. H. Larned, in submitting the foregoing comments and recommendations on the respective cases, appended thereto the following statement of opinion of his Department:

“The Department’s attention is directed to briefs presented by counsel. Local counsel representing the case before the Bureau and Department have been afforded full opportunity to review all of the papers to which reference has been made in this memorandum. He also has been assured that, in accordance with the regular custom, he will be permitted to make an oral argument before the Acting Secretary at such time as the latter shall designate.

F. H. LARNED,

Acting Commissioner-General.” [73]

Upon receipt of the comments and recommendations from the Acting Commissioner-General of Immigration along with his opinion in the matter, the Acting Secretary of Labor reviewed the same and made the following comment or final decision of his Department:

“After carefully considering all of the evidence contained in these records and summarized and commented upon in the above memorandum, as well as briefs presented by counsel, and after having heard Attorney C. L. Bouve representing the arrested aliens before the Department and A. W. Parker in behalf of the Bureau of Immigration, I hereby approve of the conclusions set forth above, except as noted in the margins, and direct that the action indicated in each particular case shall be taken except as



so noted, and that in the excepted cases (to wit, Sondara, Siroop, Sher Mohammed, Nihal, Dial, Bhan) warrants be canceled.

LOUIS F. POST,  
Acting Secretary."

## XI.

And your respondent denies the allegations that the said Secretary of Labor issued said warrant of deportation and so directed the deportation of the said four aliens by and through errors and mistakes of law.

1. And your respondent admits the allegations of subdivision 1 of said paragraph XI, except that your respondent denies that the reasons for the warrants of deportation of the said four aliens were not grounds for deportation and alleges further that the issuance of said warrants was under and by virtue of the laws and rules of the Immigration Department.

2. And your respondent denies the allegations in subdivision 2 of paragraph XI that the issuance of said warrant was [74] in violation of law and in excess of the power conferred upon the said Secretary of Labor, and alleges further that said warrant of deportation was issued in accordance with all laws and regulations of the Immigration Department as supported and construed by the courts of the United States.

## XII.

And your respondents admits the allegations in paragraph XII of said petition, but denies that said alien has exhausted all his rights and remedies before the Department of Labor in that no petition has been



made for a re-hearing of the case before the said Department.

WHEREFORE, your respondent prays that a writ of Habeas Corpus do not issue herein, that the Order to Show Cause be discharged, and that the Petition be dismissed.

BEN J. L. McKINLEY,  
United States Attorney, Attorney for Respondent.

By WALTER. E. HETTMEN,  
Assistant United States Atty. [75]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says:

That he is an immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

(Duly verified.)

Service of the within Return by copy admitted this 23 day of Dec., 1913, waiving nothing.

H. F. MARSHALL,

[Endorsed] Filed Dec. 23, 1913. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk [76]

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**Citation on Appeal—Copy**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To SAMUEL W. BACKUS, Commissioner of Immigration for the Port of San Francisco, and JOHN W. Preston, United States Attorney, His Legal Representative: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein Henry F. Marshall, petitioner for writs of habeas corpus for and on behalf of Thirty-five Hindus, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-

trict of California this 10 day of September, A. D. 1914.

M. T. DOOLING,  
United States District Judge.

Service and receipt of a copy of the within Citation is admitted as of this 10th day of September, 1914.

JOHN W. PRESTON,  
United States Attorney.  
By ED. F. JARED,  
Asst. United States Attorney.

[Endorsed]: Filed Sep. 10, 1914. W. B. MALLING, Clerk. By C. W. CALBREATH, Deputy Clerk. [77]

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**Praecipe for Transcript on Appeal.**

*In the District Court of the United States, in and for the Northern District of California.*

No. 15,500

In the Matter of the Application for a writ of Habeas Corpus by HENRY F. MARSHALL, For and on behalf of Kaiser Singh, Isser Singh, Schumonda Singh, Naran Singh, Go Pi, Amanat Khan, and Rehmat Khan.

No. 15,502.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Attar Singh.



No. 15,503.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Khan Singh, Keher Singh, Mangal Singh, and Neva Singh.

No. 15,524.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Bram Singh.

No. 15,528.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Nika Singh, Ottam Singh, Portapa, Harnan Singh, Joala Singh, Argen Singh, Sunda Singh, Mala Singh, Hardut Singh, Bir Singh, Sarwan Singh, and Dhin Mohammad.

No. 15,529.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Sucha Singh, Niaz Ma Khan, Gulam Din, and Dhian Singh.

No. 15,530.

In the Matter of the Application for a Writ of Habeas Corpus by HENRY F. MARSHALL, for and on behalf of Radha Singh, Gurzechen Singh, Gori Shankar, Variam Singh, and Kehir Singh. [78]

**Praeceptum.**

To the Clerk of said Court:

Sir Please prepare for use as Transcript on Appeal in the above-entitled and numbered cases, the following:

- (a) The Order and Judgment
- (b) The Petition and Notice of Appeal
- (c) The Assignment of Errors
- (d) The Order Allowing Appeal
- (e) The Petition for Writ, filed in case #15,503
- (f) The Order to Show Cause, filed in Case #15,503
- (g) The Return in Case #15503
- (h) The Citation on Appeal.

**MEMORANDUM INSTRUCTIONS**

In Items b, c, and d, please abbreviate title of Court and Cause as follows: (Style of Court, Titles and Numbers of Causes.)

In item e, f, and g, please abbreviate title of Court and Cause as follows: (Style of Court, title and Cause No. 15503.)

In Item h, please abbreviate title of Court and Causes as in Items b, c, and d.

In Item e, please abbreviate titles of affidavits attached to Petition as Exhibit "E" as follows: (Entitled, Before Department of Labor, in re Kahn Singh), or the name of the individual in whose behalf the affidavit was made. Where signature to affidavit is in foreign language, indicate by (Signature in Hindustani).

In all cases of verification abbreviate by (Duly verified), whether the same be affidavits or petitions.

Very respectfully,

HENRY F. MARSHALL,

Attorney for Petitioner. [79]

[Endorsed]: Filed May 1, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

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**Certificate of Clerk to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 80 pages, numbered from 1 to 80, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matters of the Petitions for Writs of Habeas Corpus, by Henry F. Marshall, for and on behalf of certain Hindoos, numbered 15,500, 15,502, 15,503, 15,524, 15,528, 15,529, and 15,530, respectively, as the same now remain on file and of record in the office of the clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with "Praecipe" (copy of which is embodied in this Transcript), and the instructions of Henry F. Marshall, Esquire, attorney for appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of Thirty-nine and 70/100 (\$39.70) Dollars, and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the Original Citation on Ap-



peal, issued herein (paged 82 and 83).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 12th day of September, A. D. 1914.

[Seal]

WALTER B. MALING.

Clerk.

By C. W. Calbreath,

Deputy Clerk. [81]

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**Citation on Appeal—Original.**

UNITED STATES OF AMERICA.—ss.

The President of the United States to SAMUEL W. BACKUS, Commissioner of Immigration for the Port of San Francisco, and JOHN W. PRESTON, United States Attorney, his legal representative. Greeting.

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Henry F. Marshall, petitioner for writs of habeas corpus for and on behalf of Thirty-five Hindoos, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-  
trict of California, this 10 day of September, A. D.  
1914.

M. T. DOOLING,  
United States District Judge. [82]

Service and receipt of a copy of the within Cita-  
tion is admitted as of this 10th day of September,  
1914.

JOHN W. PRESTON,  
United States Attorney.  
By ED. F. JARED,  
Asst. United States Attorney. [83]

[Endorsed]: Nos. 15,500, 15,502, 15,503, 15,524,  
15,528, 15,529, 15,530. United States District Court  
for the Northern District of California. Henry F.  
Marshall, etc., Appellant, vs. Samuel W. Backus,  
etc. Citation on Appeal. Filed Sep. 10, 1914. W.  
B. Maling, Clerk. By C. W. Calbreath, Deputy  
Clerk

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[Endorsed]: No. 2486. United States Circuit  
Court of Appeals for the Ninth Circuit. Henry F.  
Marshall, Appellant, vs. Samuel W. Backus, as  
Commissioner of Immigration for the Port of San  
Francisco, Appellee. In the Matter of the Applica-  
tion of Henry F. Marshall, for Writs of Habeas  
Corpus on Behalf of Thirty-five Hindus. Tran-  
script of Record. Upon Appeal from the United  
States District Court for the Northern District of  
California, First Division.

Received and filed September 18, 1914.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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**[Order Extending Time to September 20, 1914, to  
File Record, etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

Consolidated Cases Nos. 15,500, 15,502, 15,503, 15,524,  
15,528, 15,529, 15,530.

In the Matter of the Application for a Writ of  
Habeas Corpus by HENRY F. MARSHALL,  
for and on Behalf of, etc.

Good cause therefor appearing, it is ordered that  
the appellants in the above-entitled cause may have  
to and including September 20th, 1914, within which  
to file their record upon appeal and to docket the  
cause in the above-entitled court.

Dated September 10, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: No. 2486. In the United States Cir-  
cuit Court of Appeal, Ninth Circuit. In the Matter  
of the Application for a Writ of Habeas Corpus by  
Henry F. Marshall, for and on Behalf of etc. Order  
Extending Time Under Rule 16. Filed Sep. 10,  
1914. F. D. Monckton, Clerk. Refiled Sep. 18, 1914.  
F. D. Monckton, Clerk.





No. 2486

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY F. MARSHALL,

*Appellant,*

VS.

SAMUEL W. BACKUS, as Commissioner  
of Immigration for the Port of San  
Francisco,

*Appellee.*

In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

**BRIEF FOR APPELLANT.**

HENRY F. MARSHALL,

ALBERT MICHELSON,

*Attorneys for Appellant.*

*Filed this*.....*day of February, 1915.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*

F. D. Monckton,  
*Clerk.*





No. 2486

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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HENRY F. MARSHALL,

*Appellant,*

VS.

SAMUEL W. BACKUS, as Commissioner  
of Immigration for the Port of San  
Francisco,

*Appellee.*

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In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

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## BRIEF FOR APPELLANT.

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This is a consolidated appeal from an order denying several petitions for writs of habeas corpus, the cases arising under the immigration law, and being brought here upon the record in one of the cases as typical of all.

### History of the Cases.

The persons, on behalf of whom the writs were sought, are Hindu aliens. They had been duly and

regularly admitted to enter the United States by qualified officials administering the immigration law at the Port of Manila. Later they travelled to the continent, directly and without leaving the jurisdiction of the United States. Upon their arrival at San Francisco, they were arrested, and are now ordered deported to India, upon warrants, issued by the Secretary of Labor. The warrants charge that these persons are in the United States in violation of law, specifying that

The said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.

The Court below, in denying the petitions, based its decision (trans. p. 2), largely upon its judgment in a former similar case, *In re Rhagat Singh*, 209 Fed. 700. This former decision was appealed and is now under submission here under the title, "*Healy v. Backus*," No. 2436.

In deciding the case at bar the trial judge held substantially as follows:

(1) That an alien, duly admitted under the immigration laws at Manila, is admitted to the Philippine Islands only, and not to the United States at large.

(2) That aliens, arriving at continental ports from other parts of the United States, may be ex-

cluded from the mainland precisely as though coming direct from foreign territory.

(3) That there is no material distinction between the exclusion of an alien applying for original admission and the expulsion of an alien theretofore duly landed.

(4) That, because the aliens appear to have had a fair hearing, the Court may not examine into the merits, although the case is one of expulsion and not of exclusion.

Each of the matters so decided constitutes a radical departure from the interpretation and practice of immigration law, as the same has heretofore obtained. And each of these points is fully covered by the Assignments of Error set forth in the record.

### **Points Raised on This Appeal.**

In former immigration appeals, as shown by the reported cases, the only question raised, and therefore the sole question decided, has related to the power of Congress to legislate along certain lines.

The present appeal differs materially from all others in this, that the question of the power of Congress to legislate is not raised at all. To the contrary, we shall discuss solely the extent to which Congress has exercised its power to legislate in immigration matters, and we shall ask this Court to determine authoritatively, just what powers have been granted to, and what withheld from, the execu-



tive officers. We ask Your Honors to say to the immigration officials, "Thus far shalt thou go and no farther".

The principles of immigration law which the appellant seeks to establish on this appeal are substantially as follows:

(1) That an alien, duly admitted to land at any port of entry, is thereby admitted, not to a limited territory, but to the entire United States; and may thereafter freely pass throughout the entire jurisdiction, unless expressly forbidden thereto by law.

(2) That, in the absence of fraud, the Secretary of Labor has no jurisdiction to review the decision of immigration officers in the Philippine Islands respecting the admissibility of an alien to enter the United States, whether such review be attempted directly or indirectly.

(3) That there is a substantial and material difference between cases of expulsion and of exclusion, not only as to the appropriate procedure and the persons amenable thereto, but also in the causes prescribed therefor and in the finality of the decisions reached by the officials.

(4) That the law does not clothe with any finality the decision of the Secretary of Labor in expulsion cases, and that, by reason thereof, it is within the power and is the duty of the federal courts to examine into the merits of such cases on habeas corpus.

(5) That, in the present cases, the warrants of deportation, issued by the Secretary of Labor, are void in that they do not state a cause for deportation under the immigration law.

Each of these contentions we will discuss in order.

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## I.

**An Alien, Duly Admitted to Land at any Port of Entry, is  
Thereby Admitted, not to a Limited Territory, but  
to the Entire United States; and may Thereafter  
Freely Pass Throughout the Entire Jurisdiction, Un-  
less Expressly Forbidden Thereto by Law.**

The Acts of Congress, comprising the immigration laws of the United States, are general statutes. This will not be denied. Being general statutes, they are of general operation throughout the entire jurisdiction, unless specifically limited, and the term "United States", as used in the immigration laws includes the Philippines. Section 33 of the Immigration Act\* reads as follows:

Sec. 33. That for the purpose of this Act the term "United States" as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone: *Provided*, That if any alien shall leave the canal zone and attempt to

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\* Where sections of the "Immigration Act" are cited reference is had to the "Act of February 20, 1907 (34 Stat. 898) as amended by Acts of March 26, 1910 (36 Stat. 263) and March 4, 1913.

enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.

The law authorizes the appropriate immigration officers to examine aliens applying for admission to the United States, and to exclude or admit them—exclude them from or admit them to the “United States” as defined by the Act, and not to or from some limited portion thereof. The fact that the section quoted specifically excepts the Canal Zone from the United States and forbids the passage therefrom to other portions of the jurisdiction of aliens, except under conditions applicable to all aliens—this fact carries with it, by necessary implication, a provision that aliens from other portions of the jurisdiction *may pass exempt from such conditions*.

Our contention for the rule that aliens, once admitted to the United States, may freely pass from one portion of the jurisdiction to another, is greatly strengthened by the fact that the law provides a single exception thereto. The exception is found in Section 1 of the Immigration Act; and the President’s proclamation pursuant thereto is quoted at length in Immigration Rule No. 11 (Immigration Laws and Rules, 4th ed., p. 27).

The exception refers to “laborers holding limited passports”, that is, passports limited to some other country, or to the Canal Zone, or to the Insular



Possessions, who attempt to use such passports to enter the continental territory of the United States, from such other country or such Canal Zone, or from such insular possessions; and it is provided that such aliens shall not be admitted to the continent.

It follows by necessary implication that, if a certain class of admitted aliens are forbidden to pass from the insular possessions to the continent, all admitted aliens, not of the forbidden class, are permitted by the law to freely pass. And the persons on whose behalf the petitions were filed, not being of the forbidden class, may, under the law, come to the mainland, freely and without molestation by the immigration officials.

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## II.

**The Secretary of Labor Has no Jurisdiction to Review the Decision of Immigration Officers in the Philippine Islands Respecting the Admissibility of an Alien to Enter the United States, Whether Such Review be Attempted Directly or Indirectly.**

The administration of the immigration laws, as distinguished from their operation, is entrusted by Congress to two distinct sets of executive officials, their respective jurisdiction depending upon the geographical location of the port of entry at which the alien applies for admission. And in each terri-

torial subdivision the jurisdiction of the appropriate officials is exclusive.

Section 22 of the Immigration Act\* provides in part:

“The Commissioner-General of Immigration \* \* \* shall, under the direction of the Secretary of Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States. \* \* \* He shall establish such rules and regulations \* \* \* and shall issue from time to time such instructions, *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto \* \* \*”

Section 6 of the Act of February 6, 1905† (33 Stat. 689) provides that

“The immigration laws of the United States in force in the Philippine Islands shall be administered by the officers of the general government thereof designated by appropriate legislation of said government, and \* \* \*”

Construing these statutes together, it is evident that Congress has entrusted the administration of the immigration laws of the United States, for the geographical subdivision of the United States, known as the Philippines, to a certain corps of officials; and that it has likewise entrusted such administration in all other portions of the country to another corps, viz., to the Secretary of Labor and the Commissioner-General and his subordinates.

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\* See pamphlet Immigration Laws, page 13.

† Idem, page 52.

*And in its respective geographical territory the jurisdiction of each set of officials is complete and exclusive, there being no provision of law whereby the acts of one are rendered reviewable by the other.*

For many years, and until June, 1913, this territorial jurisdiction, absolute and exclusive, was recognized and respected by the Secretary of Labor and the Commissioner-General, not only passively but directly, since the pamphlet "Immigration Laws", published under authority of the Department of Labor in July, 1914, carries, on page 21, this:

NOTE.—The act entitled "An act to regulate the immigration of aliens into the United States", approved February 20, 1907, is the immigration act or law referred to in the following (revised) rules. All numbered sections mentioned in the rules refer to those of said act unless stated to the contrary. These rules apply to aliens seeking admission to each and every portion of the United States *except the Philippine Islands, in which territory the immigration laws are administered by officers of the general government of those islands.*

And not only did the Secretary of Labor and Commissioner-General expressly disclaim jurisdiction of aliens arriving via the Philippines, but Rule 14, until its amendment as hereafter noted, provided that an alien who had been admitted to the United States at insular ports, upon producing a certificate of such admission, should be admitted to the mainland without further examination.



Upon June 16, 1913, however, Rule 14 was amended to read as shown below, the amended portions appearing in italics:

Subdivision 1. EXAMINATION AT INSULAR PORTS. Aliens arriving in Porto Rico, Hawaii or the Philippines, bound for the continent shall be inspected and given a certificate, signed by the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, showing fact and date of landing.

Subd. 2. CERTIFICATES FOR ALIEN INSULAR RESIDENTS. Aliens who, having been manifested *bona fide* to Porto Rico, Hawaii or the Philippines and having resided there for a time, signify to the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, an intention to go to the continent, shall be furnished such certificate, as evidence of their regular entry at an insular port.

Subd. 3. ADMISSION AT CONTINENTAL PORTS OF ALIENS PRESENTING CERTIFICATES.—Aliens applying at continental ports and surrendering the certificate above described, shall, upon identification (and payment of head tax, if from Porto Rico or Hawaii) be permitted to land, *provided it appears that at the time such aliens were admitted to Porto Rico, Hawaii, or the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland.*

Subd. 4. ARREST AND DEPORTATION.—If such aliens fail to present the certificate, it shall be presumed that they were not examined when entering Porto Rico, or Hawaii, or the Philippines, and they shall be arrested in accordance with Rule 22 on the ground of entry without

inspection and such other grounds, if any, as may be found to exist. *If it is found in accordance with subdivision 3 hereof that such aliens were at the time of entry to Porto Rico, Hawaii, or the Philippines, members of the excluded classes or likely to become public charges if they proceeded thence to the mainland, they shall be arrested in accordance with Rule 22 on either or both of those grounds.*

A comparison of the rule as amended with the rule as it stood before amendment, made in the light of the note above quoted, shows, conclusively, an attempt by the department officials to read into the law a construction that is not there, and to arrogate to themselves a jurisdiction and to exercise an authority, which has not been conferred by Congress and which they themselves, prior and up to that date, had specifically disclaimed.

As the claim to such jurisdiction and authority was first made by the amendment of June 16, 1913, citation of cases prior to that date would not be of assistance, and the matter has not been passed upon subsequently. The question, as it arises here is *sui generis* and entirely new, and must be passed upon as such by this Court.

It is true that Section 22 of the Act empowers the Commissioner-General to establish such rules as he may deem proper, but it expressly limits those rules to such as are "not inconsistent with law". The amendment objected to is inconsistent with law in the following particulars:

(1) It attempts a review of the action of immigration officers in the Philippines in admitting aliens to the United States, such review to be made when such alien may arrive at a continental port irrespective of the passage of time.

(2) It attempts to control the movement of aliens after admission, *by imposing a condition* upon their movement from one part of the United States (Manila) to another (San Francisco).

(3) It imposes upon the alien a burden not contemplated by law, in that it requires him to prove *in praesenti* that *at some past time* he was not likely to become a public charge.

(4) It requires the alien to prove that he was not likely to become a public charge *upon the happening of a contingency*, such contingent-conditional admission not being within the contemplation of the law.

(5) It attempts to shift the burden of proof in expulsion cases from the government to the alien.

For these reasons we believe that this Court must hold that Rule 14 is invalid as being in excess of the power to make rules, conferred upon the Commissioner-General by law.

Moreover, it having been decided by the immigration officers at Manila that these persons were *not* likely to become public charges, and the Secretary of Labor having no jurisdiction to re-examine, review or reverse such decision, that decision stands today, not as *res adjudicata*, but as the only existing de-



cision made with jurisdiction thereof. It follows that the recital to the contrary in the warrant is of no force and effect, but void for want of jurisdiction; and the warrant depending entirely thereon is likewise void.

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### III.

#### **There is a Substantial and Material Difference Between the Exclusion of an Alien Applying for Original Admission and the Expulsion of an Alien Theretofore Duly Admitted.**

The distinction, between the exclusion-and-shipment-back of an alien applying for original admission and the expulsion-upon-arrest of one theretofore admitted to enter the United States, is real and substantial, and clearly recognized by the immigration law. For example, Section 3 of the Act prohibits the landing of prostitutes and provides for the deportation (expulsion) of aliens practicing prostitution, pandering, and the like. Continuing, it provides punishment for aliens who attempt "to return to or to enter" the United States, after he has been "debarred or deported" for a violation of the section; clearly covering (1) an attempt to *enter* by one who has been *debarred* and (2) an attempt to *return* by one who has been deported.

So consistently does the Act recognize this distinction that the expressions "deport, deported and deportation" as used therein, refer exclusively to expulsion of aliens from within the country, with

three exceptions only. Standard dictionaries give two meanings to the word "deportation"; first, "expulsion, banishment", and second, "transportation". In the three exceptions noted the second meaning is used. They refer to the suspension of deportation of persons required as witnesses, physically unable to travel, or who are wife or child of a permanent resident. In all other instances the meaning "expulsion" is obvious from the context.

This distinction is recognized, also, in text books, digests and the Immigration Rules. Both the Federal digest and the Century, under the general title "Aliens", carry a sub-title "Exclusion or Expulsion". Mr. Bouve's work entitled, "Exclusion and Expulsion of Aliens" is customarily cited as an authority, while Immigration Rules 21 and 22 provide respectively for the "Deportation of Excluded Aliens", and the "Arrest and Deportation on Warrant" of aliens whom it is sought to expel.

This point was raised in the Court below and was formally conceded by the United States attorney, who also conceded, in so many words, that the present case is one of expulsion and not of exclusion.

In briefing the case, however, counsel, despite his concession, confused the causes, laid down in the law for exclusion, with those prescribed for expulsion. He also strenuously urged the application to expulsion cases of a rule obtaining only in exclusion cases, viz., "In exclusion cases the Court may not examine into the merits on habeas corpus,

since the law makes the decision of the immigration officers final, except upon appeal to the Secretary”.

For these reasons it is important and necessary to briefly examine the distinction made by the law between the two classes of cases.

#### THE EXCLUSION OF APPLICANT ALIENS.

In exclusion cases the alien comes direct from foreign territory and is seeking original admission. He may have been here before, but that does not affect his status, it being determined by the fact that he comes from without the United States. Such persons, in the diction of the Immigration Service, are termed “applicant aliens” and their cases “applicant cases”.

Upon arrival at a port of entry the alien is examined by an Immigrant Inspector to determine whether or not he is a member of the excluded classes (Section 2 of the Act) such as idiots, insane, felons, anarchists, prostitutes, etc., and persons likely to become public charges. This is termed “primary inspection”.

Upon primary inspection the inspector either lands the alien or, if he does not appear “clearly and beyond a doubt entitled to land”, he is detained for hearing before a Board of Special Inquiry. Even if the first inspector passes him, the decision may be challenged by another inspector, and this also serves to take the alien before the Board (Section 24).



The Board of Special Inquiry consists of three inspectors, who sit as a trial Court. It holds hearings in private, keeps a permanent record of proceedings and testimony, has authority to admit or debar the alien, and the decision of two members prevails, except an appeal be taken, by the alien or the dissenting inspector, to the Secretary of Labor. If the Board's decision is adverse to the admission of the alien, such decision is final, subject only to an appeal to the Secretary (Section 25).

The appeal to the Secretary is allowed the alien in all except certain specified cases. It is taken upon a transcript of the permanent record, which is forwarded to Washington through official channels, accompanied by written comment on the case by the immigration officer in charge. A brief may also be filed on the alien's behalf. Nothing beyond this record may be considered upon the appeal, and upon it the Secretary examines and decides the case—either affirming the decision of the Board or sustaining the appeal.

The Court will note that the procedure in these exclusion cases corresponds very closely to the criminal procedure of the courts in this State in felony cases. The alien has a preliminary hearing before a single inspector (committing magistrate); he has a hearing before the Board of Special Inquiry (trial in the Superior Court); and he has an appeal to the Secretary from the decision of the Board (appeal from the judgment of the Superior Court). And, as the judgment of conviction in the

Superior Court is final unless reversed on appeal, so also the decision of the Board is made final by law, subject only to the appeal to the Secretary. So that, taken all in all, the rights of the alien in exclusion cases are reasonably well safeguarded.

The provision of law, making final the adverse decision of the Board, is found in the same section of the Act with, and follows, the provisions of law prescribing the powers and duties of Boards of Special Inquiry (Section 25). It reads as follows:

*Provided*, That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor.

The Court will note the limitations which are placed on the doctrine of the "Finality of Decisions" of immigration officers. Such decisions are final only as follows:

- (1) When the case is one where an alien is *excluded from admission into the United States*;
- (2) Where the decision is that of the *appropriate* immigration officers;
- (3) When the decision is *adverse to the alien*,  
and
- (4) When the decision is not reversed upon appeal to the Secretary.

Evidently, the finality of decision being limited to cases where an alien is "excluded from admission

into" the United States, that doctrine does not attach to the case at bar where it is sought to "expel from within" an alien theretofore admitted.

Furthermore, the "appropriate" officers, whose decision is made final, are those composing the Board of Special Inquiry, and none others. This appears conclusively (a) from a reading together of the entire section, and (b) from the fact that the law does not provide for an appeal to the Secretary from any decision except that of a Board of Special Inquiry. And such Board sits in exclusion cases only, and has no function whatever, as we shall hereafter show, in expulsion cases such as this. So that the provision of the law may be accurately paraphrased as follows:

"In exclusion cases the decision of the Board of Special Inquiry, if adverse to the admission of the alien, shall be final, unless reversed upon appeal to the Secretary."

In construing the provision of law above quoted, the Courts have gone very far indeed in upholding the immigration officers, acting within their jurisdiction, and in affirming the finality of their decisions upon questions of fact in exclusion cases. The following are the leading decisions, and all are exclusion (not expulsion) cases.

Ekiu v. United States, 142 U. S. 651;

Lem Moon Sing v. U. S., 158 U. S. 538;

United States v. Jew Toy, 198 U. S. 253;

Chin Yow v. United States, 208 U. S. 8;



Tan Tung v. Edsell, 223 U. S. 673;  
Ex parte Lee Kow, 161 Fed. 592;  
United States v. Williams, 190 Fed. 897.

These cases have formulated, modified, affirmed and approved a rule, which is correctly stated as follows:

In exclusion cases, the decisions of questions of fact by the appropriate immigration officers, acting within their jurisdiction, is final, subject to an appeal to the Secretary, and the courts will not enquire into the merits where it appears that the alien has been accorded a fair hearing and there is some evidence to support the decision.

The lengths to which the Courts have gone in upholding this rule is well illustrated by the Jew Toy case, *supra*. In this case a Chinese person coming from abroad was ordered excluded. On habeas corpus the District Court determined that Jew Toy was an American citizen by birth and therefore not within the purview of the immigration laws. Upon appeal, however, the Court held that the question of citizenship was one of fact, upon which in exclusion cases the decision of the immigration officers was final, subject to an appeal to the Secretary. The opinion was by a majority of the Court, but the alien (*sic*) was deported. The cases of Chin Yow and Tan Tung, *supra*, involved the same question of citizenship.

In view of the almost arbitrary power invested in the immigration officers by the statute and the rule of interpretation above quoted, we believe and

urge that its application be confined to the class of cases specified by the statute, and that the attempt here made to extend its application to expulsion cases be definitely forbidden by this Court.

The immigration law is drastic and deals arbitrarily with human liberty and should be strictly construed.

Redfern v. Halpert, 108 C. C. A. 262.

#### EXPULSION OF ALIENS FORMERLY ADMITTED.

Expulsion cases differ from those of exclusion in every important particular. *Ex vi termini*, they deal with persons already within the country, and involve the right to remain and not the right to enter.

Proceedings in these cases (Rule 22) start with an "Application for a Warrant of Arrest" (trans. p. 28). This is made to the Secretary of Labor and may be made by any person, but in practice is usually made by some immigration officer. Upon this application, a "Warrant of Arrest" issues (trans. p. 29) and the alien is taken into custody. A hearing follows; it is presumed to be before the Secretary but in practice the evidence is taken by some one detailed for that purpose. A written record of the proceedings and evidence produced is forwarded to Washington, and upon that naked, written record (and such briefs as may be filed) the Secretary of Labor, and he alone, determines the case, issues his Warrant of Deportation (trans. p. 26) or cancels the warrant of arrest. There is

no decision by any immigration officer, and obviously there is no appeal to the Secretary from his own decision.

The law has not affirmatively provided for any appeal or review, and if this cannot be had by habeas corpus, under general provisions and principles of law, there is no relief. If the rule as to finality of decisions, applicable to exclusion cases, is to be extended to cover the decision of the Secretary in expulsion cases, then the destiny of tens of thousands of foreign-born residents, whether naturalized citizens or not, is to depend wholly upon the arbitrary action of one man. This is a power greater than that wielded by the infamous and hated Third Section of the Russian Secret Police, a centralization of power absolutely inconsistent with the principles of this government, and renders the validity of the judgments (of naturalization) of our Courts dependent wholly upon the will of an executive officer.

We urge that this Court confine the application of the rule to exclusion cases, as provided by statute, and adjudge in unmistakable language the different status of decisions by the Secretary in expulsion matters.



## IV.

**The Law Not Having Rendered Final the Decision of the Secretary of Labor in Expulsion Matters, it is Within the Power and Duty of the Federal Courts to Examine Into the Merits on Habeas Corpus.**

That the statute does not, affirmatively, make final the decision of the Secretary in expulsion cases, aside from the foregoing demonstration, is upheld by the legal maxim, "*Expressio unius est exclusio alterius*". The law, having made final the decision of one set of officials (Board of Special Inquiry) thereby refuses to make final the decision of another official (the Secretary).

Moreover, the United States Circuit Court of Appeals for the Seventh Circuit, on March 14, 1911, decided this very question in favor of our contention, in the case of *Redfern v. Halpert* (108 C. C. A. 262). That was an expulsion case and the Court, in its opinion, adopted the language of the trial judge who said:

"I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case."

The syllabus as found in the official reports reads:

"The decision of the Secretary of Commerce and Labor in proceedings to deport an alien under the Immigration Act is not final; but the Court on habeas corpus may inquire into the whole case."

Other cases, also, have recognized indirectly that the rule is confined to exclusion cases.

The Secretary's decision not being made final, and there being no appeal or other method of review provided by law, the only possible way in which the personal liberty of the alien may be secured is by the writ of habeas corpus. And to deny him the right to that writ would trench dangerously close upon the provision of the Constitution which declares that:

“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

Yet if the government's contention in the present instance is to be upheld, the privilege of the writ is to be, not only suspended, but absolutely destroyed.

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## V.

**The Warrants of Deportation, Issued by the Secretary of Labor in the Present Cases, are Void in That They do not State a Cause for Expulsion Under the Immigration Law.**

This point is materially different from the question of the Secretary's jurisdiction to review the decisions of officials in the Philippines under the cloak of deportation warrants.

We have seen that exclusion and expulsion are distinct entities in law. It follows that the causes for each are equally separate and distinct and not interchangeable, and unless the causes for exclusion are, in so many words or by necessary construction, made causes for expulsion, they do not exist as such.

The causes for expulsion and the persons affected thereby are divided by law (Secs. 20 and 21 of the Act) into three groups, as follows:

(1) Those who have entered the United States in violation of law;

(2) Those who have become public charges within a limited period from causes existing prior to landing, and

(3) Those found in the United States in violation of law.

This grouping of "expellables" is not only upheld by our interpretation of the statute, but is in direct and complete accord with the Department's classification, as set forth in its official publication, "Immigration Laws". The footnote to Immigration Rule 22 (Arrest and Deportation on Warrant) found on page 37 of the pamphlet, reads:

"This rule applies to the following classes of aliens: (1) Those who have entered the United States in violation of law; (2) Those who have become public charges from causes existing prior to landing; (3) Those 'deemed to be unlawfully within the United States' under Sec. 18 and Sec. 3. Class (1) includes all aliens who at the time of entry belonged to any of the



classes enumerated in Sec. 2 or Executive Order of March 14, 1907 (Rule 11), and who should therefore have been excluded at that time; also aliens who enter contrary to the terms of Sec. 36 and Rules 12 and 13. As to class (2): Usual instances in which an alien becomes a public charge are where he enters a public almshouse or hospital or is sent to jail. What may be a 'cause existing prior to landing' depends somewhat on the circumstances of each case. In actual practice such cause is usually a physical or mental defect, to be proved in subdivision 3 of this rule."

The Court will note that the Department's ruling limits membership in Class 3 to those "deemed to be unlawfully in the United States" under Sections 3 and 18, and specifically provides that "membership in the excluded classes at time of entry" brings an alien within Class 1 (those unlawfully entering) and not within Class 3 (those unlawfully present).

Under this interpretation, the charge in the warrant that the "aliens are found in the United States in violation of the Act" and the specification "in that they are members of the excluded classes" are fatally inconsistent; the charge being that the aliens are members of Class 3, and the specification, according to the Department's own ruling, placing them in Class 1.

But aside from merely technical objections, it is obvious that these persons are not members of Group (class) 1, since they did not enter unlawfully, but were duly and regularly admitted by

authorized officials, and no fraud in connection therewith is so much as hinted, much less alleged.

Neither do they belong within Group (class) 2, since they are not public charges.

If amenable to expulsion at all, then, these persons must be within Class 3, those present in violation of law. That such is not the case is conclusive for three reasons.

#### A.

The provision that aliens who *have become* public charges shall be expelled necessarily excludes mere *liability to become* such as a ground for expulsion.

It must be conceded that one who has actually become a public charge was, at the time he landed, one of the class who were liable to become such. And this "liability" has been conclusively proven by subsequent events.

The law, then, by providing that certain of this class (those who *have become* public charges) shall be expelled, has by necessary construction exempted from expulsion those who are now thought to be *liable* only. "The expression of the one is the exclusion of the others."

#### B.

An examination of Section 2 of the Act shows that the causes for exclusion, with a single exception, are matters of "fact". The exception is "likely to become public charges" and that is a matter of "opinion", the law vesting the right to

form that opinion in the examining Inspector or the Board.

It has been held that a fact, to be a cause for exclusion must be a "present existing fact at time of entry".

Ex parte Watchorn, 160 Fed. 1014;

Ex parte, Koerner, 176 Fed. 478.

It follows that an "opinion" to be a cause for exclusion must likewise be a present existing opinion at time of entry. And obviously a *subsequent* opinion, or a change of opinion by the same officer, would not operate to bring these aliens within membership in the excluded classes, much less a different opinion subsequently held by officials who had no jurisdiction to decide the question originally.

### C.

As has been said already "public charges from causes existing prior to landing" were indisputably at the time of such landing "persons liable to become public charges", and as such were undeniably members of the excluded classes.

If the government's present contention, to wit, that members of the excluded classes may be expelled as present in violation of law, were correct, these public charges might be expelled as "found here in violation of law".

That such is not the law is obvious from the fact that Congress considered it necessary to provide for their expulsion as a separate and distinct class.



In the briefs in the Court below, much was made of the specification in the warrants that certain aliens at time of entry were "afflicted with uncinariasis (hookworm) a dangerous contagious disease".

From a legal standpoint, as a cause for exclusion, a "dangerous contagious disease" stands on precisely the same plane with "likely to become a public charge", and what has been said as to the latter applies, with some slight modification, to the former.

Without asking this Court to go into the merits of this question, it may be remarked that, as the transcript shows (pp. 51, 53, 57), the sole evidence of disease is a certificate that at the time of reaching San Francisco, a year or two after entry, the men were diseased. Against this were placed in evidence two certificates that they were not diseased, one dated prior and one subsequent to landing at Manila; also the presumption that they were examined and found free from disease by immigration doctors at the time of entry, as required by law. And this was one of the matters appellant sought to have reviewed.

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We believe that it has been conclusively shown that the Court below was in error in holding

(1) That an alien admitted at Philippine ports is admitted to only a limited portion of the territory of the United States;

(2) That aliens, coming from the islands, may be excluded from the mainland as though coming from abroad;

(3) That there is no material difference between exclusion and expulsion, and

(4) That the federal courts may not examine into the merits of expulsion cases upon habeas corpus.

Because of these errors we believe the judgment denying the writs must be reversed.

Dated, San Francisco,  
February 19, 1915.

Respectfully submitted,

HENRY F. MARSHALL,  
*Appellant.*

HENRY F. MARSHALL,  
ALBERT MICHELSON,  
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No. 2486.

IN THE  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
FOR THE NINTH CIRCUIT

HENRY F. MARSHALL,

*Appellant,*

vs.

SAMUEL, W. BACKUS, as Commissioner  
of Immigration for the Port of San Fran-  
cisco,

*Appellee.*

**BRIEF OF APPELLEE**

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*Filed this.....day of April, A. D., 1915.*

F. D. MONCKTON, Clerk.

By.....Deputy Clerk

APR 2 - 1915

F. D. Monckton  
Clerk



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In the Matter of the Application of Henry F. Marshall  
for Writs of Habeas Corpus on Behalf of  
Thirty-five Hindus.

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## BRIEF OF APPELLEE.

In the case of Healy against Backus, No. 2436, decided March 18, 1915, by this Honorable Court, the facts were identical in almost every feature with those of this case, so there is no need of a discussion of the circumstances of the evidence. The sole question now to be determined is whether or not that opinion filed March 18, 1915, has fully answered all the contentions of coun-



sel on the points of law raised in this case. Counsel have not in their brief alleged that there was any unfairness in the immigration proceedings in the matter of according the aliens and their attorneys all the rights and privileges afforded them by the immigration laws, nor have counsel contended that there was an abuse of discretion on the part of the Secretary of Labor because of any insufficiency of evidence upon which to base his findings. To state it briefly:

Counsel's main objection to the warrants of deportation is based on the ground that the law is inadequate to meet such a set of circumstances, or, in other words, that the interpretation of the immigration laws does not permit the expulsion of these particular aliens. The reasons for the attack on the law were briefly summarized under five topical headings on page 4 of counsel's brief and will be discussed in the order there adopted.

## I.

### WAS THE LANDING IN THE PHILIPPINE ISLANDS EQUIVALENT TO ADMISSION INTO THE MAIN LAND OF THE UNITED STATES?

That point is fully covered by the opinion of this court in the case of Healy against Backus, No. 2436, in which Judge Wolverton said:

“It will be seen that the previous Rule 14 treated aliens once admitted to the Philippines as entitled to admission to the main land upon identification

without further examination. The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the main land when much likelihood would not exist as to them in insular possessions, and hence they are subjected to further examination upon their entry at continental ports.

“It might well be that aliens would be likely to become public charges on the main land when such would not be the case with them were they to remain in the insular possessions, such as Porto Rico, Hawaii, or the Philippines, where the labor and climatic conditions are essentially different, where the habits of the people, their modes and standards of living, and their environment are in a marked degree dissimilar.

“It is apparent that the same tests for discovering and determining the likelihood of becoming public charges would not be as applicable or as efficacious in the one case as in the other. So that there exists a potent reason for the adoption of the rule requiring additional examination where aliens have been manifested in these insular possessions and go on certificate to the main land.”

## II.

### MAY THE SECRETARY OF LABOR REVIEW THE DECISION OF THE PHILIPPINE ISLAND OFFICIALS?

It is claimed that the Commissioner-General of Immigration exceeded the authority granted him under Section 22 in promulgating Rule 14 with the last amendment which provides for the examination of aliens com-

ing from the Philippine Islands. Counsel state that Rule 14 is "inconsistent with the law" for the reasons briefly enumerated but not discussed upon page 12 of their brief. These contentions can not be upheld. In the Government's brief, pages 51 to 54, inclusive, in the case of *Healy v. Backus*, No. 2436, is set forth an argument and authorities on these points. That this Honorable Court sustained the Government's contention is indeed evident when Judge Wolverton in his decision said:

"The power of the Commissioner-General for adopting rules and regulations for carrying the provisions of the Immigration Act into effect is very broad, and if it be, as we have said, it might well be that persons would not be likely to become public charges in insular possessions, or certain of them, while they would be likely to become public charges on the continent, why is it not a reasonable and perfectly natural exercise of that power to admit such persons to the insular possessions on condition that if they proceed to the main land they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the Act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Congress. *The admission to the insular possessions under the amended Rule 14 is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission.* \* \* \*

"Such new and revised regulation, we are impressed, was not a violation therefore of any vested rights of the petitioners, and the inquiry would still



remain whether they would be likely to become public charges on the continent, having relation under the amended rule to the time of their admission to the Philippines.”

If a mistake was made by the immigration officials, who worked in conjunction with the Customs Service and under the supervision of the War Department, in landing these aliens in the Philippine Islands, surely the mistake can be rectified. If an alien is mistakenly landed on the main land of the United States and later the error is brought to light and it is found that the alien had certain latent defects, physical or mental, the alien may be arrested and expelled and the error thereby corrected.

The Courts have decided in two very clear-cut opinions that the immigration officials may arrest and expel aliens whom they had mistakenly admitted and who were members of the excludable classes at the time of entry. These cases, *Pearson v. Williams*, 202 U. S. 281, and *The Japanese Immigrant Case*, 189 U. S. 87, held that the decisions admitting or landing aliens are not matters res adjudicata and are subject to reversal upon a hearing to correct errors of judgment. See also *United States v. Williams*, 175 Fed. 275.

If the Secretary of Labor may rectify a previous mistaken admission into the main land of the United States surely he can correct the error of admission into an insular port. It should be noted, however, that there is no attempt to review the decision of the Philippine Island officials in the sense contended for by counsel on page

8 of their brief since the officials located there are responsible to some department other than the Department of Labor, but these alien Hindus voluntarily removed themselves to a territory under the jurisdiction of the Secretary of Labor.

In the Philippine Islands the proper immigration officials' decision is conclusive anywhere within the jurisdiction of their geographical territory, but with the removal of these aliens to the United States and their coming within a territorial jurisdiction of the Secretary of Labor, the authority of the ruling of the Philippine Island officials ceased.

It is apparent that counsel have not answered Judge Dooling's statement when in his written opinion in deciding this case in the District Court he said:

“I am satisfied, therefore, that the action of the authorities at Manila is not conclusive upon the immigration officers on the main land, and while the law is, in its present form, very uncertain and unsatisfactory, I am of the opinion that whether we call it exclusion or expulsion, the immigration officers may prevent the entry to the main land of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines; if they so have the power to exclude, as the aliens appear to have had a fair hearing, the fact that this was done under a Warrant of Arrest is immaterial.”

## III AND IV.

IS THE DECISION OF THE SECRETARY OF  
LABOR FINAL IN AN EXPULSION CASE  
AS WELL AS IN AN EXCLUSION  
PROCEEDING?

It is admitted that the proceedings in this case are in the nature of *expulsion* since the aliens were arrested under warrants emanating from the Secretary of Labor, but when counsel attempt to make a distinction between the proceedings by claiming that in exclusion cases the ruling of the Secretary of Labor is final and in expulsion cases his decision is not final, this distinction is an explanation not founded on reason.

For their authority in sustaining their attempted distinction, they cite Redfern against Halpert, 186 Fed. 150, 108 C. C. A. 262, in which there is one sentence which reads as follows:

“I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case.”

A careful reading of that decision will show that the all important matter before that court was the question of the three-year limitation in expelling aliens from the United States and that the judge could never have ruled that the court should in expulsion cases usurp the powers of the Secretary of Labor. That case is an isolated opinion which has never been followed and is directly contrary to all Supreme Court decisions. It is absurd



to argue that Congress intended that in expulsion cases the courts should transform themselves into an immigration bureau and rehear all the evidence. If the Secretary of Labor is a mere figurehead and his rulings on questions of fact can not be final, and his prerogatives and powers are to be taken over by the courts, then his functions are useless and his office should be abolished.

Counsel cite a number of *exclusion* cases in which they admit that the court's decision is final and conclusive, but in that list they fail to set forth the *expulsion* cases which have also determined that the ruling of the Secretary of Labor shall be final.

The Japanese Immigrant Case, 189 U. S. 87, is an expulsion case in which the alien woman was arrested upon a warrant from the Secretary of Labor. When the case came up to the Supreme Court on appeal from an order denying the writ of habeas corpus, Justice Harlan said:

*"Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. Ed. 1146, 1149, 12 Sup. Ct. Rep. 336; Fong Tue Ting v. United States, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 547, 39 L. Ed. 1082, 1085, 15 Sup. Ct. Rep. 967."*

It is a basic principle that the rulings on questions of fact by the executive officials of the immigration bureau on either exclusion or expulsion is final and not subject to judicial review. This principle was early expressed in *Fong Tue Ting against United States*, 149 U. S. 697.

*“The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend. \* \* \**

*“It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of Acts of Congress, to submit the decisions of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.”*

Judge Seaman expressed a similar opinion on the finality of the ruling of the Secretary of Labor in the expulsion proceeding in the case of *Prentis against Di Giacomo*, 192 Fed. 467:

*“We believe the rule to be settled, however, under these congressional enactments, that their enforcement against aliens is vested exclusively in the designated executive department, for hearing, ascertainment of the facts, and rulings thereupon, ‘without judicial intervention;’ that Congress has so provided, within its powers, not only in respect of control over the alien at the time of landing for entry, but of like control during the probation period*

fixed by the act for ascertaining whether the entry was lawful, to direct and enforce deportation when the entry is found to be unlawful; *and that the executive finding and order thereupon is not subject to judicial review or intervention, through the writ of habeas corpus or otherwise, except for failure or denial of the administrative hearing intended by the act.*”

In *Frick against Lewis*, 233 U. S., 289, 58 L. Ed. 967, in which case the alien was expelled from the United States under a warrant proceeding on a charge under which the trial jury had acquitted the alien, the Supreme Court ruled that the Secretary’s finding of fact against the alien was final and conclusive.

“Upon appeal, the Circuit Court of Appeals reversed this judgment (115 C. C. A. 493, 195 Fed. 693), holding that the power to deport an alien existed under Sections 2 and 21 of the act, irrespective of Section 3; and further that the right to deport in this case could be found in Section 3 in connection with Section 21, without regard to conviction or acquittal under Section 3. The court also held that the acquittal of Lewis was not *res adjudicata* of the present proceeding, and that *since there was evidence tending to support the finding of the Secretary of Commerce and Labor respecting the bringing in of the woman for the purpose of prostitution, that finding was conclusive.*”

## V.

### DO THE WARRANTS STATE A CAUSE FOR EXPULSION UNDER THE IMMIGRATION LAWS?

The argument of counsel that the warrants of deportation are defective because they do not comply with



the wording of the footnote to Rule 22 found on page 37 of the Immigration Rules and Regulations is ingenious but by no means convincing. It is unsupported by any authority and will not stand a critical analysis. Counsel's definition of those deemed to be unlawfully in the United States is made under a misapprehension of the meaning of Rule 22. Paragraph (3) of the footnote does not purport to be a limitation, but a definition. In other words, those who may be found here illegally are those specified in Sections 3 and 18, but by no reasonable construction could it be held as asserted by counsel on page 25 of their brief, that those are the only aliens who may be deported after once being admitted into the United States.

That an alien is in the United States "in violation of law" because he is likely to become a public charge does not mean that the immigration officials must wait until he has *actually* become a public charge. If he is likely *ever* to become a public charge, whether in one year or in twenty years, and he had latent defects, physical or mental, at the time of his entrance which now indicate such a possibility, he is here in violation of law.

The provision of Section 30 which states "and such as become public charges from causes existing prior to landing" is the basis for the petitioner's contention that the law does not authorize or empower *expulsion* until the alien has gone beyond the stage of likelihood.

Can it be conceived that the apparent intent of Congress should be defeated because in making such provision in Section 20 it did not specifically mention the

class of those *likely* to become a public charge? All the sections of this Act must be read together, not merely Sections 2, 20 and 21 and Rule 22 with its footnote, but all from and including 1 to Section 25 of the entire act. In Section 21 there is a provision as follows:

“In violation of this Act” (meaning the act as a whole) “or *any* law of the United States.”

Is it not clearly a violation of this *Act* or *any* law if an *excludable* alien, namely, one likely to become a public charge under Section 2, has been mistakenly and through manifest error permitted to land in the United States, to say that an alien who was likely to become a public charge at the time of entry can not be deported merely because he has not yet *become* such, and because if he had, or should within three years, he can be deported on that ground alone, seems to be a refinement of reasoning not justifiable in construing and applying remedial statutes such as the immigration laws. It is only by reasoning along lines similar to the foregoing that a meaning can be assigned each provision of Sections 20 and 21. As a matter of fact, said sections were not new legislation when they were enacted so far as they contemplated the *expulsion* of aliens on the ground that they were likely to become public charges at the time of entry, but were merely a re-enactment of already existing legislation and the placing of the law in more emphatic form than it had previously stood. When the Act of 1907 was passed the practice of arresting and expelling aliens on this ground had been continued for some time. This practice had prevailed in cases in which

aliens deemed likely to become public charges were arrested soon after being landed even before the passage of the Act of 1903. This last assertion is supported by no less evidence than the statement of facts in the Japanese Immigrant Case, 189 U. S. 86-87, which related to a Japanese woman arrested in 1901 after she had entered the country, one of the charges against her being "likely to become a public charge." In that case the action of the administrative officers was upheld by the Supreme Court and the decision has repeatedly been cited since in support of numerous propositions arising under this phase of the immigration law.

The Acting Commissioner-General, in an opinion rendered recently in discussing this point, said:

"Unless the statute is given the construction above contended for, a considerable nullification of its provisions would result—a large class of aliens that the law clearly intends shall not be permitted to enter or remain could not be removed, and after staying for three years could become public charges and still be immune from expulsion, although their maintenance would be a public burden. To state an extreme, but by no means impossible illustration: Suppose an alien is admitted today, the inspector or the board concluding that he is admissible, and tomorrow there should be brought to the Secretary's attention evidence clearly indicating that such alien was all the while likely to become a public charge; must the Secretary wait, possibly almost three years, for his conclusion to be borne out by the alien's *actually become a public charge*, before he can start proceedings for his removal, and lose the right to remove if he does not become such until the three years have expired? The mere statement of this



supposititious case reduces the contention to such an absurdity as not to be countenanced in construing a statute of police and public security like the immigration law, which by all canons of construction is to be construed liberally to effect its purpose. (Japanese Immigrant Case, 189 U. S. 96, 97.)”

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney.

WALTER E. HETTMAN,  
Assistant United States Attorney.

No. 2486

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HENRY F. MARSHALL,

*Appellant,*

VS.

SAMUEL W. BACKUS, as Commissioner  
of Immigration for the Port of San  
Francisco,

*Appellee.*

In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

## APPELLANT'S REPLY BRIEF.

HENRY F. MARSHALL,  
ALBERT MICHELSON,  
*Attorneys for Appellant.*

*Filed this.....day of May, 1915.*

**FRANK D. MONCKTON, Clerk.**

*By.....Deputy Clerk.*

**Filed**

MAY 12 1915

F. D. Monckton





No. 2486

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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HENRY F. MARSHALL,

*Appellant,*

vs.

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*Appellee.*

---

In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

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## APPELLANT'S REPLY BRIEF.

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Counsel for appellee declines to squarely assume either of two positions—either that these are cases of expulsion or cases of exclusion. In one portion of his brief he contends for the right to *exclude* these aliens from the mainland; in another he urges the authority of the Secretary's warrant for *expulsion* purposes. For these reasons we have been obliged to point out the illegality of the Depart-

ment's action from both standpoints. We urge that this Court in its decision determine authoritatively whether, in its opinion, these are cases of exclusion or of expulsion.

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## I.

**The Admission of an Alien at any Port of Entry, Whether Insular or Continental, is Admission to the "United States" at Large, and not to any Particular or Limited Subdivision Thereof; and Rule 14 is Therefore Void, as Inconsistent with Law.**

We pointed out in our opening brief that immigration laws are general statutes and therefore of general and uniform operation; that they authorize the admission of aliens to, and their exclusion and expulsion from, the United States as a whole and not to or from some limited portion thereof. Upon this contention counsel declines the issue, and the contention must be deemed conceded.

Section 33 of the Immigration Act specifically includes the Philippine Islands as a part of the United States for immigration purposes, and it follows that admission at Manila is admission to the "United States" equally with admission at a continental port. And such admission includes, as of course, the right to freely pass to and fro within the territory of the "United States", whether insular or continental, unless expressly forbidden by law.

That this point, as here presented, is new is obvious from the fact that counsel for appellee in his brief can cite no authority other than this Court's recent opinion in the case of *Healy v. Backus*. It is true that, in that case, this point was referred to, but we submit that it escaped the Court's attention by reason of its merely casual presentation.

The portion of that opinion relied upon by appellee sets forth the effect of Rule 14, before and after amendment, substantially as follows, the verbiage being ours:

Rule 14, before amendment, declared that aliens admitted to the Philippines are admitted to the United States at large and may pass where they please without further examination.

Rule 14, as amended, declares that aliens admitted to the Philippines are *not* admitted to the United States at large and may *not* pass to the mainland without further examination.

In the last analysis the rule, both before and after amendment, is in legal effect merely a declaration of what, in the Commissioner-General's opinion, is the proper interpretation of the law (directing what his subordinates shall do under such interpretation). He says, first, "The Philippines are part of the United States, and you will act accordingly"; then he changes his mind, and says: "The Philippines are not a part of the United States". Both of these declarations are by executive order, promulgated, it is claimed, under author-



ity of a power to establish rules and regulations (Sec. 22, Immig. Act).

These two interpretations are contradictory and squarely adverse, one to the other. The statute law in the premises has not been changed. It follows that one of the interpretations is correct and right, and that the other is wrong, incorrect, "inconsistent with law" and therefore void. And the question is, "Which?"

The construction for which we contend has received the sanction and approval of the authorities for over fifteen years. The construction, which the Department now seeks to establish, is an after-thought and a subterfuge. It was evolved in 1913 for the express purpose of removing, from the mainland, races of people which Congress and the Department were willing should be admitted and inhabit the Philippines, but which the immigration authorities (and not Congress) believe should be kept out of continental territory. In fact Congress, at its last session, refused to enact proposed legislation which would effect directly what it is hereby sought to accomplish indirectly.

The subsisting Act of Congress declares that the Philippines are part of the United States; the Commissioner-General's rule holds otherwise and directs his subordinates to act accordingly.

The question is squarely before this Court: Shall the Act of Congress prevail, or shall an executive order over-ride the statute law?

We submit that this Court must hold that Rule 14, as amended, is void.

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## II.

### **The Secretary of Labor has no Jurisdiction to Review, Directly or Indirectly, the Decision of Philippine Island Officials.**

Counsel for the appellee contends that the action of the Secretary, under consideration here, is not an attempted review of the decisions of insular officials. By such contention and the evasion of the issue as offered, he concedes that *if it were such attempted review* it is beyond the powers conferred on the Secretary by statute.

Judge Dooling, in his decision, goes far beyond the utmost claims of the immigration authorities when he holds that aliens coming from the insular possessions have the same status so far as exclusion goes as aliens coming direct from foreign territory. The language of the opinion (appellee's brief, p. 6) is as follows:

I am of the opinion that \* \* \* the immigration officers may prevent the entry to the mainland of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines.

And this Court, in *Healy v. Backus* (appellee's brief, p. 4), held similarly that an alien coming

from the Philippines might yet be excluded from the mainland on the ground that "he is one of the excluded classes".

Taking these decisions as expressing correctly the law (which we do not concede) it follows necessarily that the Philippines, for the purpose of exclusion from the mainland, must be considered as quasi-foreign territory. The alien, then, arriving from Manila, is in precisely the same position as though arriving directly from abroad. For this Court cannot hold that his status is worse by reason of his residence under the flag.

Conceding all the foregoing to be true and correct, yet this case must be reversed.

An alien, whether from foreign or quasi-foreign territory, must be excluded from the mainland, if at all, by reason of his condition at the time he applies for admission thereto.

Ex parte Watchorn, 160 Fed. 1014;

Ex parte Koerner, 176 Fed. 478.

An Italian, who had lived in London and applies for admission at New York, would have, under the above theory of the law, precisely the same status as a Hindu, who has lived in Manila and applies at San Francisco. Both may have been paupers when reaching London and Manila; both, by a combination of industry and luck, may have acquired in their respective cities of temporary residence a fortune of \$10,000. But, under the government's contention in the present case, the Italian would be



admitted, while the Hindu, though a rich man now, would be excluded because *at the time he entered Manila* he was a pauper and excludable.

The government and this Court must take one of two positions; either Manila is foreign territory for the purpose of excluding its aliens from the mainland, or it is not. There is no middle ground.

If it is such territory, the alien arriving therefrom must be excluded by reason of his condition *at the time he arrives at the mainland*; if it is not, he cannot be *excluded* at all.

The sole charge upon which it is sought to expel (or exclude, if the Court prefers) these aliens is that "at the time they landed in Manila" they were likely to become public charges. There is no charge that they now are or were at the time of reaching San Francisco likely so to become. To the contrary, as a matter of law, the government, by not charging to the contrary, admits that they were then and are now neither public charges nor likely to become such.

If this matter be one of *exclusion* from the mainland, it is neither charged nor proven that the aliens were at time of application members of the excluded classes. To the contrary it is admitted that they were not such, and the order of exclusion must be reversed.

Moreover, if it shall be determined by this Court that these are cases of *exclusion* from the mainland, then these aliens have been unlawfully deprived of

the benefit of a trial before a Board of Special Inquiry, as provided by Sections 24 and 25 of the Immigration Act, and for this reason also the decision must be reversed.

But we contend that this is not a case of *exclusion* from the mainland, but of expulsion *from the United States*.

The law says that the Philippines are part of the United States for immigration purposes; it confides the decision of immigration questions affecting applicants at Philippine ports to certain officials; it does not provide for the review of such decisions by the Secretary of Labor when such aliens proceed to the mainland after admission.

Counsel for appellee admits that such review is not contemplated. He denies that the proceeding under discussion is such review, and says it is merely the correction of the mistakes of Manila officials. This is a distinction without a difference and unworthy of discussion.

Finally counsel fall back on the plea that it is unthinkable that a situation has arisen which is not within the provisions of the law. That such situations are continually arising and have to be met by further legislation is quite within the experience of every lawyer and every Court. Such a situation in immigration matters arose regarding laborers with limited passports and was met by additional legislative enactment.

The Court should uphold the law as it is, and should not permit the Department to twist existing statutes to meet conditions which they do not and never were intended to cover, merely because the Commissioner-General believes that such should be the law.

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### III.

**There is a Substantial and Material Difference Between the Exclusion of an Alien Applying for Original Admission and the Expulsion of an Alien Theretofore Duly Admitted.**

This point is formally conceded by counsel for appellee and would require no further discussion were it not that counsel wrongfully assumes, as a premise for the next point to be considered, that the law makes final the decision of the Secretary in *exclusion* matters. Such is not the law.

**In no immigration matter whatsoever does the law make final the decision of the Secretary of Labor.**

The law does make final, in *exclusion* matters, the decision of certain immigration officers *other than the Secretary*. And in certain of these cases the decision of such officers is final without appeal to the Secretary; in others such appeal is allowed.

Section 10 of the Immigration Act provides:

That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall



be final as to the rejection of aliens afflicted with tuberculosis, etc.

And Immigration Rule 17, relating to appeals, provides:

Subd. 4. *Where no appeal lies.*—No appeal lies where the decision of a board of special inquiry, based solely upon the certificate of the examining medical officer, rejects an alien because \* \* \*

Subd. 5. *Where no appeal lies, but admission on bond may be requested.*—No appeal lies where a decision of a board of special inquiry, based *solely* upon the certificate of the examining medical officer, rejects an alien because he is suffering \* \* \*

There being no appeal to the Secretary, it is evident that there is no finality accorded to his decision under this provision.

But Section 25, which alone is relied on for the doctrine of the finality of the Secretary's decision, specifically mentions Section 10, and must therefore be read therewith. The first-mentioned section, after providing that in *exclusion* cases the decision of the "appropriate immigration officers" shall be final subject to an appeal to the Secretary, continues:

But nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this act.

Reading these two sections together (and the Act must be construed as a whole) it is evident that

the “appropriate immigration officers” mentioned in Section 25 and the “board of special inquiry” in Section 10 are one and the same. And it is their decision alone, and only in exclusion cases, which is made final, in the one instance with and in the other without the right of appeal.

There being no other provision in the law making anybody’s decision final, it must be held that the decision of the Secretary is not made final by the law and therefore is subject to review by a federal Court. And such review is all we seek.

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#### IV.

### **It is the Right and Duty of Federal Courts on Habeas Corpus to Examine Into the Merits of Expulsion Cases, There Being no Finality Attached to the Decision of the Secretary of Labor.**

Having demonstrated that the statute law nowhere renders final the decision of the Secretary in expulsion cases, it remains only to examine whether or not there are Court decisions (court-made law, so to speak) declaring such finality and therefore precluding an examination into the merits on habeas corpus.

It is appellant’s position that there are no such decisions, that the decisions in point, on the contrary, support our position, and that for that reason the lower Court in the case at bar should have examined into the merits.

## CASES CITED BY APPELLEE.

Four cases only are cited by our opponents, and these we will examine in the order of their decision in point of time.

**Fong Yue Ting v. United States, 149 U. S. 698.**

This case is the first in which the doctrine of finality of the decision of executive officers in immigration matters was discussed. The opinion says:

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, *may* be exercised entirely through executive officers; or Congress *may* call in the aid of the judiciary to ascertain \* \* \*

The very important distinction between what Congress *may do*, and what it *has done*, in the way of legislation, cannot be disregarded here. Moreover the case was decided in 1893, long before the passage of the Immigration Act, and can in no case be considered authority on the question of what Congress *has done*, which is the sole question here.

**The Japanese Immigrant Case, 189 U. S. 86.**

This alien "clandestinely entered" the United States by escaping from a ship at Seattle, and had never been "duly landed" as had the persons in the present case. On its merits, while *in form* an expulsion case, it was one of exclusion and was so treated by the Court. The question of the finality of the *Secretary's* decision in expulsion cases was



neither raised nor decided. To the contrary the Court (in the last paragraph) said:

As no appeal was taken to the Secretary from the decision of the Immigration Inspector, *that decision* was final and conclusive.

A case which holds that the decision of the inspector was final and conclusive because no appeal was taken, is not authority for the finality of the Secretary's decision where there is no appeal.

A case holding that the inspector's decision is final, in the absence of an appeal, upholds our contention that it is the decision of the inspectors and not the Secretary which is made final by the law.

**Prentiss v. Stathakos, 192 Fed. 467.**

In this case the learned judge recited the rule as it obtains in *exclusion* cases, referring also only to *exclusion* authorities; continuing he says:

While need for such a provision is obvious in the first mentioned instance of landing at the port of entry, doubtless a different rule might reasonably be provided for hearings thereafter.

It is true that he *assumed* that the same rule applied to *expulsion* cases, but the point here raised was neither discussed nor decided. The case is not authority on the present question.

**Lewis v. Frick, 233 U. S. 291.**

The language quoted by counsel in his brief was not part of the Supreme Court's decision in this case; it was merely a statement of what had been

held by the lower Court. And the Supreme Court, as to the first part thereof, declared it to be error, and as to the rest pointedly refused to approve, deciding the case on other grounds.

In the decision of that case in the Circuit Court of Appeals, from which that appeal was taken (reported in 115 C. C. A. 493), the appellate Court recited the rule as it obtains in *exclusion* cases. It formally recognized the rule as being, by the statute, *confined to exclusion cases*, but expresses its opinion that the principle may be *extended* to cases of expulsion also, basing its conclusion solely upon *Bates & Guild Co. v. Payne*.

The latter case was a suit in equity in which was upheld the conclusive right of the Postmaster-General to determine whether certain mail matter should pass second or third class. To argue that, because one official has exclusive power to determine whether a magazine shall pay one cent or two cents postage, therefore another has conclusive power to determine whether human beings may remain in the United States or not, is to resort to far-fetched reasoning of the most vicious character. And this reasoning the Supreme Court pointedly declined to countenance. The true rule in such case is better expressed in the case of *St. Louis etc. Ry. v. U. S.*, (188 Fed. 191) where the Court said:

It (the statute) may not be extended by construction to those who are not within the class of parties denounced by it nor to acts which are not by the expressed will of the legislature

clearly made offenses under it, although such parties and acts may in the opinion of a court be as vicious as those within its terms.

Regulations of the Secretary of Agriculture are ineffective to add to the classes \* \* \* or to the acts denounced by the statute.

A legislative body may delegate to an executive the power to find some fact or situation on which the operation of the law is conditioned or to make and enforce regulations for the execution of a statute according to its terms.

It cannot, however, delegate its law-making power, its power to exercise the indispensable discretion to make, add to, to take from or modify a statute.

#### CASES IN APPELLANT'S FAVOR.

The sole case in all the reports, in which the precise question here involved, to wit, the finality of the Secretary's decision in expulsion matters, is discussed and decided, is that of *Redfern v. Halpert*, (108 C. C. A. 262) cited in our opening brief at page 22. Counsel seeks to belittle the decision. He says that "It is an isolated case and has never been followed, and is directly contrary to all Supreme Court opinions". If this be true, and it is not, it is strange that counsel has not cited a single case in which this precise point is raised and discussed, much less decided to the contrary.

The case is a recent one, decided in March, 1911, just four years ago. It is the only one in which this point is raised, and it has never been reversed. It is therefore the law of the land and is absolutely conclusive. And other cases, by inference at least,



support the decision. For the convenience of the Court a few of the expressions to that effect are recited.

**Redfern v. Halpert, 108 C. C. A. 262.**

*Syllabus.* The decision of the Secretary of Commerce and Labor in proceedings to deport an alien under the Immigration Act is not final; but the Court on habeas corpus may inquire into the whole case.

*Decision.* I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case.

**Gonzales v. Williams, 192 U. S. at 15.**

If the person does not come within the provisions of the act the Commissioner (Secretary) had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.

**Davies v. Manolis, 179 Fed. 818 (C. C. A.).**

The final determination of the statute applicable to the case and the interpretation of the grant of power therein cannot rest with the executive officers under any authority cited; nor can such finality of executive decision have sanction under our system of government.

**Fong Yue Ting v. United States, 149 U. S. 698.**

(Three Justices dissenting as to the *power* of Congress to make final executive decisions in *expulsion* cases)

BREWER, J. (p. 738). Whatever may be true as to exclusion \* \* \* I deny that there is any arbitrary and unrestrained power (in Congress) to banish residents, even resident aliens \* \* \*

FULLER, C. J. (p. 762). Conceding that the exercise of the power to exclude is committed to the political department and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rest upon different ground.

FIELD, J. (p. 755). I utterly dissent from and reject the doctrine that "Congress, under the power to exclude and expel aliens, might have directed (them) to be removed out of the country by executive officers, without judicial examination, just as it might have authorized such officers to prevent their entrance to the country.

It is thus seen that the distinction between *exclusion* and *expulsion*, which we make in this case, has been recognized by the Courts for over twenty years; also that executive decisions may be made final in the one instance without being final in the other. The only case in which this point was decided held that the Secretary's decision is *not* final, and this Court will follow the law as it is and not as some executive believes it should be.

As to the evils, which the acting Commissioner-General anticipates from following the law as it is, (appellee's brief, page 13), they may or may not happen. If they do, the remedy is in the hands of Congress and should be sought by the Department in the halls of legislation and not by attempt to impose upon this Court a strained construction of existing statutes, tortured to confer powers and meet circumstances which they were never designed or intended to meet or confer. The opinion of the *act-*

ing Commissioner-General, (a layman, who was then merely the chief clerk of the Bureau, and is now an inspector and assistant commissioner at New York), is unworthy the prominence and weight accorded it by counsel.

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## V.

### **The Warrants Issued by the Secretary of Labor do not State a Cause Against These Aliens, Whether for Exclusion or Expulsion.**

If these cases be considered as cases of "exclusion from the mainland", as seems to be the case under the opinion in *Healy v. Backus*, the warrants do not state a cause for exclusion in that the alleged cause is not a *present subsisting circumstance* at the time of their application for admission to the mainland.

Ex parte Watchorn, 160 Fed. 1014;

Ex parte Koerner, 176 Fed. 478.

If these cases be considered as cases of expulsion from the United States, and we hold that they must be so considered, the warrants do not state a cause for expulsion by reason of the fact that they negative the decision of Philippine officials as to the admissibility of these persons to enter the United States at the time they entered Manila. This decision is a present subsisting decision by the only officer having authority to determine that question. And the recital to the contrary in the warrant is of no force and effect.



Counsel for appellee in his brief (page 6) sets forth that:

In the Philippine Islands the proper immigration officials' decision is conclusive anywhere within the jurisdiction of their geographical territory.

We have shown that the law withholds from the Secretary of Labor the right to review such decision and in the absence of such right the decision of the Philippine official is conclusive, not only in the Philippine Islands as set forth in counsel's brief, but also throughout the United States.

---

### Conclusion.

Aside from the naked legal proposition, there are good reasons why the Secretary's decision in expulsion cases should not be final even while the decision of immigration officials in exclusion cases has such status.

An alien applying for admission has the benefit of an examination before an inspector, of a trial before a Board of Special Inquiry, and, if he so desires, of an appeal to the Secretary. And no alien can be finally *excluded* without at least two hearings, that before the inspector and that before the board.

An alien residing within the country, however, if appellee's contention is to be sustained, can have the benefit of only one hearing before a single indi-

vidual. And that hearing, if it be due process of law which we doubt, consists, not of a personal appearance before the Secretary where his physique, credibility and the character of the evidence can be determined by the person in whose hands his whole future rests, but of affidavits, ex parte statements and a cold typewritten record.

It is inconceivable that Congress intended that a stranger to the country, attempting to enter for the first time, should be granted privileges and a measure of protection of his rights against injustice, and at the same time intended that the resident should be denied the same privileges and the same measure of protection.

Dated, San Francisco,  
May 10, 1915.

Respectfully submitted,

HENRY F. MARSHALL,  
ALBERT MICHELSON,  
*Attorneys for Appellant.*

No. 2486

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

HENRY F. MARSHALL,

*Appellant,*

VS.

SAMUEL W. BACKUS, as Commissioner of  
Immigration for the Port of San Francisco,

*Appellee.*

In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

**APPELLANT'S PETITION FOR A REHEARING.**

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MAR 4 - 1916

Filed this.....day of March, 1916

F. D. Monckton,

Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.





No. 2486

IN THE

# United States Circuit Court of Appeals

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HENRY F. MARSHALL,

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In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
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## APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

The appellant above named respectfully prays for  
a rehearing of the above entitled cause, after deci-  
sion on appeal by this Honorable Court, and for  
grounds of such rehearing represents as follows,  
to wit:

Upon the appeal, this Court affirmed the judgment of the District Court “upon the authority of *Healy v. Backus*, 221 Fed. 358, and *Choy Gum v. Backus*, 223 Fed. 487”.

The *Choy Gum* case relates entirely to the fairness of the hearings and, for the purposes of this petition, may be disregarded.

The *Healy* case, however, dealt with the question as to whether there was “any pertinent or competent testimony adduced by which to support the findings of the Department”.

Upon this important question the affirmative decision of this Court rested chiefly, if not exclusively, upon the case of *United States v. Uhl*, 215 Fed. 573, a long excerpt from that decision being incorporated in this Court’s opinion.

But that case, so cited with approval, has since been reversed by the Supreme Court of the United States, which has expressly condemned the reasoning and conclusions incorporated in the *Healy* opinion. It follows that, as to this point, *Healy v. Backus* has been overruled, and is no longer authority.

The Supreme Court decision referred to was rendered on October 25, 1915, under the title *Gegiow v. Uhl*; it has not yet been reported, so far as we have been able to discover, and for that reason is printed herein in full, as “Addenda”.



## I.

**AN ALIEN LABORER CANNOT BE DECLARED LIKELY TO BECOME A PUBLIC CHARGE BY REASON OF LOCAL CONDITIONS OF THE LABOR MARKET OR LOCAL RACE PREJUDICE IN THE CITY OR STATE OF HIS IMMEDIATE DESTINATION.**

In the present case, the warrants of arrest were asked for the reason that there was no local demand for, but some local prejudice against, laborers of this class, the exact wording being (Trans. pp. 28-29):

“That these aliens are laborers; that there is no demand *in this section* for that class of labor; further that there is a decided prejudice among the people *of this locality* against this class of labor.” (Italics ours.)

Upon these representations and for these reasons the warrants of arrest issued, the specific charges being (Trans. p. 30):

“That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.”

**Obviously, local lack of demand for and prejudice against these laborers as a class is the onus of the charge.**

In the petition it is alleged (Tr. p. 20) that a lot of miscellaneous matter, letters, affidavits, interviews and newspaper clippings, tending to show lack of demand for and prejudice against this class of labor, were placed in the record.

In the return (Tr. p. 63, par. 4) it is set forth that these papers were not actually in the official record, but were part of the record in another Hindu case then on appeal, and were included in the case at bar “only by reference, and were examined by the attorney for the aliens”. These are the clippings, etc., of record in the *Healy* case, concerning which this Court said:

“There was an amount of testimony adduced in the form of affidavits, interviews, letters, and newspaper clippings, showing the state of the public mind *in California* towards the Hindus as a race or class, the condition of the labor market in general, and especially as it related to Hindus, the desirability or non-desirability among employers for their employment, and the demand or lack of any considerable demand for labor of this kind.” (Italics ours.)

**Again it is obvious that these documents, showing local lack of demand for and prejudice against this class of labor, are relied upon as constituting general evidence supporting the charge of “likely to become a public charge”.**

But the Supreme Court, in *Gegiow v. Uhl*, *infra*, has declared that an alien cannot be held to be likely to become a public charge by reason of local labor conditions, and that “it would be an amazing claim of power” if the immigration authorities decided not to admit aliens because of labor conditions which might be general all over the United States.

There being no other or further evidence in the record to sustain the findings of the Department,

the rehearing should be granted and the case reversed.

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In all fairness it should be stated that some of these aliens were discovered to have hook-worm, there being, however, nothing to show whether it was acquired before or after landing in United States territory. In view of the fact that *all the aliens were ordered deported as likely to become public charges* and those having hook-worm on the additional ground of disease, the latter may be considered merely as make-weight. At any rate this consideration does not affect those free from the disease, nor does it present any difficulty here, since, upon reversal, the matter may be remanded for further proceedings in the District Court as to the hook-worm cases.

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## II.

**THE COURT ERRED IN TACITLY REFUSING TO HOLD THAT  
ADMISSION OF AN ALIEN TO THE PHILIPPINE ISLANDS  
IS ADMISSION TO THE UNITED STATES.**

In *Gegiow v. Uhl*, the Supreme Court held that "The statute deals with admission to the United States, not to" some part thereof.

Section 33 of the Immigration Act expressly provides that "for the purposes of the Act" the term "United States shall be construed" to include the Philippine Islands.

If the Supreme Court is right and admission is to the United States and not to some part thereof,



then admission at the Port of Manila is "to the United States" as a whole and not to the Philippine Islands alone. And the question of protecting continental labor conditions from persons coming from the islands is entrusted, not to the immigration authorities at their discretion, but to the President. (*Gegiow v. Uhl, infra.*)

We respectfully submit that the petition for a rehearing should be granted, that the aliens not suffering from disease should be ordered released, and that as to the hook-worm cases the matter should be remanded for appropriate action.

Dated, San Francisco,  
March 3, 1916.

Respectfully submitted,

HENRY F. MARSHALL,

ALBERT MICHELSON,

*Attorneys for Appellant  
and Petitioner.*

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#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

HENRY F. MARSHALL,

*Of Counsel for Appellant  
and Petitioner.*

## ADDENDA.

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*In the Supreme Court of the United States*

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No. 340

October Term, 1915

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Ali Gegiow and Sabas Zarikoew,  
Petitioners,

vs.

Byron H. Uhl, as Acting Commis-  
sioner of Immigration at the  
Port of New York.

On Writ of Certiorari  
to the United States  
Circuit Court of Ap-  
peals for the Second  
Circuit.

(October 25, 1915)

Mr. Justice Holmes delivered the opinion of the Court.

The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration and have sued out a writ of *habeas corpus*. The writ was dismissed by the District Court and the Circuit Court of Appeals. (211 Fed. Rep. 236; 215 Fed. Rep. 573; 131 C. C. A. 641) By the return it appears that they are a part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary Russian tongue, and in view of that fact it was suggested in a letter

from the Acting Commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble incident to the immigration of foreigners generally which it is for legislators not for commissioners to consider, and may be laid on one side. The objection relied upon in the return is that the petitioners were "likely to become public charges for the following, among other reasons: That they arrived here with very little money (\$40 and \$25, respectively) and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded" etc. We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as makeweights. It is true that the return says for that "among other reasons". But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on appeal; and as the order was general for a group of twenty it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter we have to deal



with is the construction of the statute with reference to the present case.

The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*. The conclusiveness of the decisions of immigration officers under Section 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu v. United States*, 142 U. S. 651, relied on by the government. As was said in *Gonzales v. Williams*, 192 U. S. 1, 15, "as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary". Such a case stands no better than a decision without a fair hearing, which has been held to be bad. *Chin Yow v. United States*, 208 U. S. 8. See further *Zakonaite v. Wolf*, 226 U. S. 272; *Lewis v. Frick*, 233 U. S. 291, 297.

The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked. In the act of February 20, 1907, c. 1134, Sec. 2; 34 Stat. 898; as amended by the act of March 26, 1910, c. 128, Sec. 1; 36 Stat. 263, determining who shall

be excluded, "Persons likely to become a public charge" are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after.

The statute deals with admission to the United States, not to Portland, and in Sec. 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the general government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in Sec. 1, but it is confined to those in the continental territory of the United States and the matter is to be determined by the President. We cannot suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration, even though subject to

appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge.

*Order reversed.* | ,



